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No. 85-____

IN THE
Supreme Court of the United States
October Term, 1985

REX C. CAUBLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a court of appeals fulfills its responsibilities as a "reviewing court" under *United States v. Bagley*, 473 U.S. ____, if it makes no independent judgment as to the reasonable probability that undisclosed exculpatory evidence would have produced a different result at trial and defers instead to the discretion of the district court.

2. Whether a prosecutor's presentation of false material testimony is excused because the defense has access to documents that may be used to cross-examine the perjurious witness and demonstrate the falsity of his testimony.

3. Whether the constitutional requirement that prosecutors disclose interview reports containing exculpatory evidence extends to situations in which an interviewed witness does not explicitly contradict a government witness but provides an account that is inconsistent with that witness' testimony.

PARTIES BELOW

The parties below were the United States and Rex C. Cauble, who was also identified in the original indictment as doing business as Cauble Enterprises. Other persons who were listed as interested in the outcome in the court of appeals below, were Josephine Cauble, Lewis Rex Cauble, and John M. Gray.

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OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioner's motion for a new trial (App. A, pp. A-1 - A-11, *infra*) is not reported. The opinion of the district court denying petitioner's new trial motion (App. D, pp. A-15 - A-50, *infra*) is also unreported. The court of appeals decision affirming petitioner's conviction is reported at 706 F.2d 1322.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1985, and a timely petition for rehearing and suggestion for rehearing *en banc* were denied on April 9, 1985 (App. B, pp. A-12 - A-13, *infra*). On May 29, 1985,

Justice White extended the time for filing a petition for writ of certiorari to and including July 8, 1985 (App. C., p. A-14, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. Background

Petitioner was a highly respected Texas businessman who headed a family partnership ("Cauble Enterprises") that operated a number of very successful ventures, including ranch and farm land, banks, western-wear retail stores, oil interests, and a steel company. Between late 1976 and November 1978, a number of individuals, including Charles "Muscles" Foster, the foreman of Mr. Cauble's ranches, participated in a marijuana-smuggling enterprise under which 147,000 pounds of marijuana were carried illegally on shrimp boats from Colombia to various locations in Texas and distributed in the United States. Assets belonging to Cauble Enterprises were used in the smuggling venture, including the Cauble Enterprises private airplane, various buildings on Cauble Enterprises ranches, and the services of some Cauble Enterprises employees. In addition, Foster borrowed funds from Cauble Enterprises and used the money in the smuggling conspiracy.

Multi-count indictments against a number of the participants in the smuggling conspiracy were returned in the Eastern District of Texas in January, May, and July 1979. Several of the indicted defendants pleaded guilty. Others went to trial, and some were convicted. *See United States v. Butler,* 486 F. Supp. 1285 (E.D. Tex. 1980), *rev'd sub nom. United States v. Hamm,* 659 F.2d 624 (5th Cir. 1981); *United States v. Ruppel,* 666 F.2d 261 (5th Cir.), *cert. denied,* 458 U.S. 1107 (1982). The principal figures were Foster, who was acquitted by reason of insanity, and Raymond Hawkins, who was found

guilty after trial and sentenced to 20 years' imprisonment. Following his trial, in December 1979, Hawkins was subpoenaed to testify before a grand jury under a grant of immunity. He testified that Mr. Cauble had not been involved in the smuggling scheme and that he had never discussed marijuana smuggling with Foster or anyone else in Mr. Cauble's presence (Tr. 344-345, 359, 399-402).[1]

2. Petitioner's Indictment

On August 7, 1981, Mr. Cauble was named in a ten-count indictment charging violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, the Travel Act, 18 U.S.C. § 1952 *et seq.*, and willful misapplication of bank funds, 18 U.S.C. § 656, all essentially derived from the allegations that he had known of, and participated in, the marijuana smuggling venture. Among the defense's earliest pretrial motions was a written request for disclosure by the government of "any and all agreements . . . whether written or oral" between the prosecutors and any government witness (I Rec. 53),[2] and any inconsistent statements of alleged co-conspirators (I Rec. 180-182). In other written motions, defense counsel requested the disclosure of exculpatory evidence, including specifically any grand jury testimony inconsistent with the testimony of other witnesses (I Rec. 183-184). The district judge directed the prosecutors "to reveal, prior to cross-examination the nature of any agreements with . . . Government witnesses or their attorneys, including any promises or concessions which might reasonably be expected to occur in the event said witnesses

[1] "Tr." designates the transcript of petitioner's trial. "N.T. Tr." designates the transcript on petitioner's motion for a new trial.

[2] "__Rec. __" refers to the volume and page number of the record below, which has been divided into separate volumes and has been consecutively paginated.

provide testimony or information favorable to the Government" (I Rec. 107). The district judge also directed the prosecutors to disclose "evidence favorable to the accused which is material to the issue of guilt or punishment of the defendant," including "statements of alleged co-conspirators indicating that they have no knowledge of the defendant's participation in the alleged conspiracy" and "[i]mpeaching evidence" (III Rec. 615).

3. Hawkins' Plea Agreement And Testimony

On September 21, 1981, Hawkins' conviction was reversed because the *voir dire* of the jury had been inadequate. *United States v. Hawkins*, 658 F.2d 270 (5th Cir. 1981). On January 5, 1982 — little more than one week before Mr. Cauble's trial was scheduled to begin — Hawkins concluded a plea agreement with the prosecutors. Rather than being retried on six counts, he entered a guilty plea to two counts carrying a maximum ten-year sentence. For the first time, Hawkins asserted that Mr. Cauble had known of the marijuana smuggling conspiracy, and he claimed that he and his wife had once been present in Mr. Cauble's home when proceeds from the sale of marijuana were given to Mr. Cauble.

Hawkins testified at Mr. Cauble's trial, and his was the only direct evidence of Mr. Cauble's personal knowledge or involvement in the illegal activity. Hawkins asserted that he took $500,000 in cash to Mr. Cauble's home where, in the presence of others, including Hawkins' wife and Foster, he counted it, gave $250,000 to Foster, and watched as Foster gave the money to Mr. Cauble.[3] Mr. Cauble denied in his own testimony that

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[3] At the beginning of his testimony about this incident, Hawkins said that Foster said to Mr. Cauble, "Here, keep this for me" (Tr. 233). He was then reminded by the prosecutor that when he first told this story to the FBI less than two weeks earlier he had ascribed to Foster a statement that would be more incriminatory of Mr. Cauble. Hawkins did not recall this statement notwithstanding the prosecutor's prodding (Tr. 286-287). He was finally shown a

any such meeting had taken place or that he had any knowledge of the marijuana smuggling conspiracy.

Hawkins also testified that he was given $25,000 by Foster in 1977 to lease trucks with which the marijuana could be transported. Foster told him, according to Hawkins, that the money came "from Cauble" (Tr. 288, 304-305). Hawkins testified that he gave $15,000 of this money to Charles Katko, the owner of a trucking company in Newark, New Jersey, for the lease of a truck (Tr. 288-289, 304-305, 432). Hawkins said that Foster told him that Mr. Cauble knew that this was being done for "a dope deal" (Tr. 308; see Tr. 432-433). Hawkins' dealings with Katko were the subject of testimony at various times while Hawkins was on the witness stand (Tr. 288-289, 307-309, 431-434). At no time did the prosecutor disclose that Katko had provided to federal investigators a substantially different version of the transaction between Hawkins and himself, telling the investigators that Hawkins had actually leased a truck for $2,000 for the purpose of hauling hay. See Defendant's New Trial Exhibit 3.[4]

4. Masterson's Testimony

In Mr. Cauble's trial the prosecutor also relied on circumstantial evidence, the most important piece of

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copy of his FBI statement and he then affirmed that when Foster gave the money to Mr. Cauble he said, "Here is your half, Mr. Cauble." (Tr. 287).

[4] The prosecutor also permitted Hawkins to testify falsely about the immunity he received in exchange for his testimony. When asked on cross-examination whether he had been immunized for perjury committed when he testified before a grand jury in December 1979 exonerating Mr. Cauble, Hawkins replied that he had no such immunity (Tr. 404). In fact, the plea-agreement letter appears to reserve to the prosecutor the right to prosecute only for *future* perjury, and not for perjury that Hawkins may previously have committed (V Rec. 1486-1487).

which related to cash deposits made in the Cauble Enterprises general operating bank account during the period of the smuggling conspiracy. The prosecutor maintained *inter alia*, that cash deposits derived from drug smuggling were disguised on Cauble Enterprises deposit tickets as cattle sales or Las Vegas gambling winnings. The prosecutor declared in his opening statement (Tr. 206-207):

> One of the things we will attempt to prove to you is motive, and I believe the evidence that the United States presents will show motive. The evidence the United States will present will show that even though Cauble Enterprises is a large business with a lot of holdings it doesn't have much cash. I believe the evidence will show you that Cauble Enterprises — all the profits generated from Cauble Enterprises were not capable of meeting the interest on the debts that Cauble Enterprises had. We'll also show you that, in fact, in 1978 — January of 1978 — a few days before the Jubilee came in, Cauble Enterprises general operating account was overdrawn $121,000.

At trial, the FBI special agent in charge of the case, Joseph G. Masterson, testified (Tr. 622):

> Q. * * * During your review of those bank statements, did you run across any negative balances?
>
> A. Yes.
>
> Q. What time frame?
>
> A. We found that in January, 1978, Rex Cauble had a deficit in his checking account — special account — in excess of $100,000.
>
> Q. How was that $100,000 balance compensated for? Where did the money come from to cover that up?
>
> A. Subsequent cash deposits.

Q. Where did the cash deposits come from?

A. From the sale of cattle, winnings in Las Vegas, and loan repayments.

The prosecutor then argued to the jury in summation (Tr. 2243-2244):

> In January, for the first time in a five-year period, the bank statements reflect that Cauble Enterprises was overdrawn $121,000.00 in their account. During that period, just before that boat came in — the first one. Then, right after that boat comes in, there becomes a tremendous — you can look at it on the graph — a tremendous influx of income into Cauble Enterprises, from a non-documented source —nothing but deposit slips.

The jury was invited to draw the inference that Mr. Cauble needed cash for the Cauble Enterprises bank account and had obtained it from the proceeds of the smuggling conspiracy.[5] In fact, the documents reviewed by Mr. Masterson indicated that the $121,000 overdraft was satisfied principally by a $99,368 loan from the Mutual Savings Bank, by a check for interest in excess of $15,000 due on a note, and by $40,000 in transfers of funds from other Cauble Enterprises accounts. See Defendant's New Trial Exhibit 11.

5. The Jury's Verdict

The jury began its deliberations after lunch on January 28, 1982. Later that afternoon, the jury asked to hear the testimony of Agent Masterson and two other witnesses. At 5:30 p.m., a tape-recording of a portion of Masterson's testimony was played for the jury (including

[5] The court of appeals drew that inference. A separate section of its opinion was titled "The Cash Deposits," and it referred in part to the fact that "in January 1978 Cauble Enterprises' special account at Western State Bank was $100,000 overdrawn . . ." 706 F.2d at 1338.

the testimony at issue here). The jury resumed its deliberations at 6:02 p.m., apparently without hearing the other witnesses. At 9:10 p.m., the jury returned a verdict of guilty on all counts. See Tr. 2335-2346.

Mr. Cauble was sentenced to five years' imprisonment on each of the ten counts, the sentences to run concurrently. On May 31, 1983, the conviction was affirmed. *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983). Certiorari was denied on January 23, 1984. 104 S. Ct. 996.

6. The New Trial Motion

A motion for a new trial based on newly discovered evidence was filed on January 23, 1984. An evidentiary hearing on the motion was held approximately two months later.

Insofar as relevant to this petition, the hearing concerned three claims of prosecutorial misconduct:

> (a) *Nondisclosure of the assurances given Hawkins.* — The prosecutor had violated the district court's order, as well as the government's obligations under decisions of this Court, by failing to disclose to trial counsel assurances given Hawkins, the government's most important witness, concerning the treatment of his then ex-wife, who was also involved in the matters under investigation.[6] Specifi-

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[6] The defense also contended that the plea-agreement letter dated January 5, 1982, had not been shown to trial counsel. Mr. Cauble's trial counsel testified that he had no recollection of having seen the letter during the trial (N.T. Tr. 147) while acknowledging that he could not be certain it was never in his possession (N.T. Tr. 149). He said, however, that he was aware of its contents, "with a couple of exceptions" (N.T. Tr. 147). He testified that if he had been shown the letter, he would have cross-examined Hawkins "more specifically as to the provisions concerning the escrow account, and this business concerning minimum security" (N.T. Tr. 149). The prosecutor testified that he had given a copy of the plea agreement

cally, the defense was not told that Hawkins had bargained for immunity for his ex-wife and had been given an assurance that she would be given an opportunity to cooperate before she was prosecuted (N.T. Tr. 102-103). The assurances regarding Mrs. Hawkins were not specified in the plea agreement (V Rec. 1486-1487) and were never communicated to Mr. Cauble's trial counsel (N.T. Tr. 149).

(b) *Suppression of the Katko interviews.* — Katko testified that he did *not* receive $15,000 from Hawkins for a truck rental, and that he had told this to federal agents during their interviews of him (N.T. Tr. 30-31). In an interview conducted approximately one month before Mr. Cauble's trial, FBI agent Masterson was told by Katko that Hawkins had given him $2,000 for the lease of a truck and promised him that he could keep $25,000 if he sold a load of marijuana (N.T. Tr. 28-29, 118, 120-124). That information was reflected in an FBI Form 302 prepared by Masterson that was introduced into evidence at the new trial hearing.[7]

Mr. Cauble's trial counsel testified that if he had seen the report of the interview with Katko, he would have used it to impeach Hawkins' testimony that he had used $15,000 provided by Mr. Cauble to lease a truck for distribution of the marijuana. He said, "[I]f they had handed me the 302 prior to trial, I cannot believe that they would have ever permitted Mr.

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to defense counsel (N.T. Tr. 107). The district court found that a copy of the plea agreement had been provided to trial counsel "prior to Hawkins being cross-examined" (App. D, p. A-30, *infra*).

[7] The report states that the truck lease was "originally to cover a load of hay" and that Hawkins paid $2,000 for the lease. There is no mention of any $15,000 payment, and no mention of any truck leasing to haul marijuana. Defendant's New Trial Exhibit 3.

Hawkins to testify that he took $15,000 up to New Jersey to give to Katko for trucking expenses" (N.T. Tr. 156).

Moreover, Katko told interviewing agents that he had no knowledge of Mr. Cauble's involvement in the smuggling conspiracy (N.T. Tr. 28). Nonetheless, in violation of the district court's *Brady* order, Katko's statements were never disclosed to the defense.

(c) *False testimony regarding cash deposits.* — FBI agent Masterson's testimony that the $121,000 overdraft in January 1978 was "compensated for" with cash deposits was palpably false. The records that the agent had painstakingly reviewed demonstrated that immediately following the overdraft, checks and a bank transfer returned the account to a positive balance.

At the new trial hearing, defense counsel sought to establish that this constituted knowing and deliberate perjured testimony on Masterson's part (N.T. Tr. 136-137):

> Q. All right, sir. Is it your opinion, Agent Masterson, that the case against Mr. Cauble was primarily a financial or bank records case, rather than based on the testimony of Mr. Hawkins?
>
> A. Yes.
>
> Q. You thought those bank records were the key; is that correct, sir?
>
> A. Yes.
>
> Q. In fact, sir, do you remember testifying that you found a negative balance in the Rex Cauble Special Account in excess of $100,000 on January, 1978?

> At this point, the trial judge interrupted the examination, asserting that counsel was "retrying the original case." He refused to accept counsel's explanation that the purpose of examining the agent was to establish that he "testified falsely on his oath with respect to that, and it's contradicted by those documents" (N.T. Tr. 138). The trial judge responded that "what you're seeking to do is simply impeachment of this witness, who testified in the original trial" (N.T. Tr. 139). As a result, no further questions on this subject were permitted.

7. The District Court's Ruling

The district court denied the motion with an opinion including 46 findings of fact. With respect to the failure to disclose all the terms of the Hawkins agreement, the district judge found that "Hawkins was thoroughly and effectively impeached at Cauble's trial" (App. D, p. A-28, *infra*). He then found that the understanding regarding Mrs. Hawkins, albeit not disclosed (pp. A-29 - A-30, *infra*)

> would not have affected the ultimate outcome of the trial because this evidence would only have gone to impeach Hawkins' testimony and, as the Court had previously found, Hawkins was thoroughly impeached at Cauble's trial.

On the suppression of the Katko interview, the district judge acknowledged the testimony of Katko that he had not received $15,000 from Hawkins for rental of a truck. Apparently because the pre-trial FBI interview did not contain Katko's explicit denial of such receipt, the court found no material conflict between Katko's pre-trial statement to the FBI and Hawkins' trial testimony (pp. A-27 - A-28, *supra*). With respect to Katko's statements to federal agents, the judge also observed (p. A-28, *infra*):

> At best, the materials only reflect that Katko was not aware of Cauble's involvement in drug smuggling at the time he discussed selling marijuana for Hawkins in early 1977.[8]

The court's concluding finding on the suppression of the Katko interview was (p. A-29, *infra*):

> Even if the Government was in possession of evidence from Katko or Smith that directly conflicted with Hawkins' testimony regarding the $15,000 payment to Katko, the evidence merely concerns a minor point of the overall charged drug smuggling operation and could in no way have affected the outcome of the trial. The conflicting statements would only have served as cumulative impeachment material against Hawkins.

The district judge also rejected the claim that FBI agent Masterson had deliberately committed perjury by finding first that "Masterson did not testify falsely" and thereafter that "the evidence relied upon by Cauble to prove Masterson did not testify truthfully is not newly discovered" (p. A-35, *infra*). The court said that the underlying documents were available to the defense, and that the defense "had the opportunity to fully cross-examine Masterson" (*id.*). The court did not, however, provide any explanation of its refusal to permit the defense to cross-examine Masterson during the new trial hearing.

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[8] The judge did not explicitly contrast this finding with the language of his pretrial order, under which the prosecutor was ordered to disclose

> statements of alleged co-conspirators indicating that they have no knowledge of the defendant's participation in the alleged conspiracy.

8. The Court Of Appeals' Decision

The court of appeals reviewed the district judge's decision under "abuse of discretion" and "clearly erroneous" standards (p. A-8, *infra*). The court held that the district judge's discretion had not been abused by its ruling with regard to the Hawkins agreement because "disclosure of this information would not have produced a different result at trial" since the jury knew that Hawkins was "receiving favorable treatment in exchange for his testimony" (pp. A-8 - A-9, *infra*).

The court of appeals also held that the district court was "not clearly erroneous" in concluding that Katko's pretrial statement "would have been cumulative impeachment of Hawkins" and that "Katko made no exculpatory statement to the government" (p. A-9, *infra*). With regard to the Masterson testimony, the court of appeals expressed doubt "whether the testimony was false or simply ambiguous." It held that Masterson's statement, "when considered in the context of his entire testimony, was not ultimately material to [Mr. Cauble's] conviction" (p. A-5, *infra*), and that since the documents had been subpoenaed from Cauble Enterprises, Cauble's counsel was at fault "since he failed to cross-examine the witness and clear up any ambiguities or inaccuracies presented by the testimony" (p. A-6, *infra*).

REASONS FOR GRANTING THE WRIT

This case presents important questions left open by this Court's very recent decision in *United States v. Bagley*, 473 U.S. ____, No. 84-48, decided July 2, 1985. Rather than making an independent judgment, as *Bagley* directs (Slip Op., p. 16), as to "whether there is a reasonable probability that . . . the result of the trial would have been different" if the agreement regarding Mrs. Hawkins had been disclosed to Mr. Cauble, or if the Katko interview had been produced, the court of appeals deferred totally to the district judge on the ground that

he had not "abused his discretion." Nor did the court below apply to the Masterson testimony the *Chapman* harmless-error standard that this Court reaffirmed, as applicable to the knowing use of perjured testimony, in its *Bagley* decision (Slip Op., pp. 11-12, n.9). Consequently, the decision of the court of appeals in this case conflicts with the most recent governing decision of this Court within the meaning of Rule 17.1(c) of this Court's Rules.

The *Bagley* case, together with *United States v. Pflaumer*, No. 84-1033, *vacated and remanded* on July 2, 1985, demonstrate that the issues raised by prosecution nondisclosure of evidence useful to the defense are recurring and will continue to arise in the federal courts. The proper standards by which post-conviction claims of this kind are to be resolved should be determined authoritatively by this Court before the lower federal courts expend enormous judicial resources in such litigation.

In recent years, this Court has been reviewing such questions only when they have been brought to the Court by the United States or by local prosecutors. There is, however, no reason to limit review of these issues to government petitions. Although a defendant is the petitioner in this case, the legal questions he raises are as suitable for this Court's disposition as they would have been if the prosecutor had lost below and were now seeking a writ of certiorari.

1. *The correct standard of appellate review.* — In *United States v. Agurs*, 427 U.S. 97 (1976), which concerned the failure to disclose the prior criminal convictions of a murder victim, the court of appeals had reversed a district court finding that the suppressed evidence was not material. When this Court reversed the court of appeals, it did not simply defer to the trial court's discretion or suggest that the district court's finding on this question could only be vacated if it were "clearly erroneous." Instead, this Court said (427 U.S. at 114; emphasis added):

> Since the arrest record was not requested and did not even arguably give rise to any inference of perjury, since after considering it in the context of the entire record the trial judge remained convinced of respondent's guilt beyond a reasonable doubt, and since *we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable*, we hold that the prosecutor's failure to tender Sewell's record to the defense did not deprive respondent of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment.

By the same token, in remanding the *Bagley* case to the court of appeals, this Court never suggested that the court below should abdicate in favor of the district court simply because the case involved a post-trial motion alleging government suppression of favorable evidence. The court of appeals in *Bagley* had "disagreed" with the district court's finding that the nondisclosure was harmless, apparently because it did not find, as did the lower court, that the testimony of the relevant witnesses was exculpatory. This Court directed the court of appeals to render its own decision "whether there is a reasonable probability" that if the suppressed evidence had "been disclosed to the defense, the result of the trial would have been different."[9]

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[9] Earlier in Justice Blackmun's opinion delivering the judgment of the Court there is an even more clear definition of the standard to be applied by "the reviewing court" (Slip Op., p. 15):

> [T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

This case parallels *Bagley*. The district judge believed that Hawkins had been "thoroughly and effectively impeached" at Mr. Cauble's trial, just as the district court in *Bagley* believed that the testimony of the witnesses had been helpful to the defense. In fact, Hawkins' testimony was most damaging. He was the *only* witness who directly incriminated Mr. Cauble in the smuggling conspiracy. There is certainly a "reasonable probability" (*Bagley* Slip Op., p. 14) that the jury would have returned a different verdict if Hawkins had truly been "effectively impeached." The court of appeals has the independent obligation to pass on the district judge's extraordinary reasoning that the only witness who personally implicated Mr. Cauble was "effectively impeached." It cannot avoid its responsibility by deferring to the trial judge's "discretion."[10] As this Court noted in *Agurs*, the standard on review of new trial motions where *Brady* violations are claimed is more stringent than the "usual motion for a new trial." 427 U.S. at 111; *see also Bagley*, Slip Op., p. 12.

The judgment that a court of appeals must make in these circumstances is a constitutional one that must be exercised "in order to preserve the precious liberties established and ordained by the Constitution." *Bose Corporation v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1965 (1984). As was true of the issue facing the appellate court in the *Bose Corporation* case, the decision to be made "is not merely a question for the trier of fact," but relates to whether "the constitutional threshold" has been crossed. *Id.* Consequently, as was

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[10] Hawkins' testimony was repeatedly relied on by the court of appeals in affirming petitioner's original conviction. 706 F.2d at 1336, 1339, 1341-1342, 1352. The court of appeals also cited Hawkins' claimed transaction with Katko as evidencing petitioner's involvement in the initial stages of the alleged drug smuggling operation. 706 F.2d at 1335.

true in the *Bose Corporation* case, it is a question of "law in its purest form under our common law heritage" (*id.*) and must be decided after independent appellate review.

Although this Court did not explicitly consider the standard of appellate review in its *Agurs* or *Bagley* decisions, that standard will surely be a subject of substantial litigation in the future. Resolution of the question in this case will prevent much needless future litigation.

2. *The defendant's capacity to refute perjured testimony.* — Both the district court and the court of appeals believed that the falsity of Masterson's testimony regarding cash deposits was compensated for by the opportunity that defense counsel may have had to cross-examine Masterson and to prove that he erred. See pp. A-6 and A-44, *infra*. For this reason, neither court below applied the "harmless beyond a reasonable doubt" standard that governs knowing use of perjured testimony under *Napue v. Illinois*, 360 U.S. 264 (1959), and *Chapman v. California*, 386 U.S. 18 (1967). That constitutional harmless-error principle was reaffirmed by this Court in *United States v. Bagley*, 473 U.S. ____, No. 84-48, decided July 2, 1985, Slip Op., pp. 11-12, n.9.

The decision of the court below on this aspect of the case conflicts with decisions of the District of Columbia, Second, and Eighth Circuits, all of which have applied the governing test for knowing use of perjured testimony even where defense counsel had available means to demonstrate the perjury at the time of trial. See *United States v. Iverson*, 637 F.2d 799, 802-803, n.10 (D.C. Cir. 1981) ("The most minimal preparation would have disclosed to the prosecutor and defense counsel the sentencing status of the principal witness."); *United States ex rel. Washington v. Vincent*, 525 F.2d 262, 268 (2d Cir.), *cert. denied*, 424 U.S. 934 (1976) ("[W]e believe that in this case it would be inappropriate not to permit Washington to challenge the egregious and highly damaging

prosecutorial misconduct solely because he and his lawyer may have failed to use all available means for exploring the prosecutor's highhandedness at the trial."); *United States v. Bigeleisen*, 625 F.2d 203, 209, n.2 (8th Cir. 1980) (unnecessary to determine if defense counsel had knowledge of actual plea agreement where government failed to correct false testimony, impliedly reiterated same in prosecution's closing argument, and made unsupported statements during the closing argument).

The difference between deliberate use of false testimony and mere nondisclosure of exculpatory evidence is that the former is a more aggressive form of prosecutorial misconduct and warrants greater deterrence. Consequently, it should make no difference whether defense counsel had available material with which to refute the perjury. If knowingly perjured testimony has been used at trial, the judgment of conviction should be reversed unless it is clear beyond a reasonable doubt that admission of the testimony was harmless. In this case, that standard was not applied to the false Masterson testimony, and reversal is, therefore, mandatory.

3. *The explicitness of the undisclosed exculpatory evidence.* — The courts below recognized that Katko's new trial hearing testimony was inconsistent with Hawkins' trial testimony. But in considering whether Katko's pre-trial statement to the FBI should have been produced, the district judge concluded that Katko's interview was not exculpatory because Katko "never denies receiving $15,000 from Hawkins for the lease of trucks" (p. A-28, *infra*). The court of appeals held, on this basis, "that the district court was not clearly erroneous in its finding that Katko made no exculpatory statement to the government" (p. A-9, *infra*). This literalistic reading of Katko's interview conflicts with the pragmatic approach mandated by this Court in its *Bagley* decision.

In the present case, as in *Bagley*, a specific request was made by the defense for all "inconsistent

statements" between government witnesses and alleged co-conspirators (I Rec. 180-182), and for any testimony of a grand jury witness that was "inconsistent with any statement, written or oral, known to the Government" (I Rec. 183). The Katko interview was covered by this request. And, as in *Bagley*, the failure to produce any statement conflicting with Hawkins' testimony of his dealings with Katko "misleadingly induced defense counsel to believe" that Hawkins' version could not be impeached. Compare *Bagley* Slip Op., p. 15. In *Bagley*, this Court noted that the undisclosed statements were not "technically" inconsistent with the testimony of the witnesses (*id.* at 16), but this literal veracity did not render the prior statements immune from production.

The literal approach taken by the Fifth Circuit in this case conflicts with the more meaningful rule applied by the Sixth Circuit when it affirmed the district court's decision in *Jones v. Jago*, 428 F.Supp. 405 (N.D. Ohio 1977), *aff'd* 575 F.2d 1164 (6th Cir.) *cert. denied*, 439 U.S. 883 (1978). Although an undisclosed written statement by an alleged co-conspirator did not "expressly deny" certain critical allegations concerning the defendant (428 F.Supp. 407), the district court and the court of appeals held that it was essentially favorable to the defense and had to be disclosed under *Brady* and *Agurs*. *See also* IIIA Wigmore, Evidence. § 1042 (Chadbourne rev. 1970 & Reiser supp. 1985) ("A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact.")

The Court should now determine, for the guidance of lower courts, whether evidence is "exculpatory" under *Agurs* and *Bagley* only if it is squarely and literally contradictory to the central testimony of a prosecution witness. The view of the courts below in this case is based on a wholly impractical perspective of the function of defense counsel. A trial lawyer is not limited to explicit denials in impeaching a witness or in developing

exculpatory information. If an important prosecution witness claims to have paid $15,000 to rent a truck for an illegal purpose, and the alleged recipient, giving a detailed description of his dealings with the witness, identifies only one $2,000 truck leasing payment for a totally legal purpose, any competent defense lawyer would capitalize on this substantive conflict and develop effective cross-examination. *See, e.g., Monroe v. Blackburn,* 607 F.2d 148, 152 (5th Cir.), (recognizing omission in a prior statement as material), *cert. denied,* 446 U.S. 957 (1980) . Upon being confronted with Katko's version of the truck lease, Hawkins might well have revised or qualified his damaging testimony despite the absence of an explicit denial in Katko's statement.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted. Alternatively, the judgment below should be vacated so that the court of appeals may apply the governing standard enunciated in *United States v. Bagley,* 473 U.S. ____.

Respectfully submitted,

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July 1985

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2284

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REX C. CAUBLE,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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(March 12, 1985)

Before CLARK, *Chief Judge,* GARWOOD and JOLLY, *Circuit Judges.*

PER CURIAM:*

Rex C. Cauble was previously convicted by a jury on a ten-count indictment. He was charged with substantive violations of the Racketeer Influenced and Corrupt Organizations statute (RICO); three violations of the Travel Act; and four counts of misapplication of bank

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

funds. Cauble's conviction was affirmed by this court on March 31, 1983, *United States v. Cauble,* 706 F.2d 1322 (5th Cir. 1983). His petitions for rehearing and rehearing en banc were denied, as well as his petition to the Supreme Court for a writ of certiorari. *Cauble v. United States,* 104 S.Ct. 996 (1984).

On January 23, 1984, Cauble filed a motion for new trial, later amended, in which he alleged that the government had withheld favorable evidence prior to and during his trial, and that the government has used false and perjured testimony at his trial. On May 8, 1984, the district court denied Cauble's motion on all grounds alleged.

Cauble now appeals the district court's denial of his motion for a new trial on four of the eleven grounds pursued in the district court. First, Cauble argues that the FBI agent Masterson testified falsely when he stated that *cash* deposits were made in January to compensate for deficits in his checking account, when the deposits were *checks*. Next, Cauble argues that the entire plea bargain agreement between the government and Raymond Hawkins was not disclosed prior to trial, and therefore he was not able to present these items to the jury. Third, the defendant claims that the government was aware that Charles Katko, who did not testify for either side at trial, had given statements which contradicted inculpatory facts related by Hawkins in his testimony, but failed to disclose this information to Cauble. Finally, Cauble argues that the government failed to disclose information indicating that Charles Foster, Cauble's ranch foreman, was capable of managing the large drug smuggling operation involved in this case, contrary to the government's theory at trial that only Cauble was so capable. After carefully considering each of the grounds asserted by Cauble for a new trial, we affirm, without hesitation, the district court's denial.

I.

As more fully set out in our earlier opinion,[1] the events that led to the indictment and eventual conviction of Cauble arose out of independent investigations by the Drug Enforcement Administration (DEA) and the Texas Department of Public Safety (DPS). The investigation uncovered a large-scale marijuana smuggling operation which involved the transportation of drugs from Columbia to the southeastern and midwestern regions of the United States. One of the individuals uncovered in the operation was Charles Katko. Following his arrest for selling marijuana to federal and state undercover agents, Katko led the DEA to Hawkins and another individual, Charles Foster.

Further investigation by the DEA disclosed that Foster was Cauble's ranch foreman, and that Cauble Enterprises' assets were used for drug operations. Thus Cauble came under DEA scrutiny. Cauble was eventually indicted in both New York and Texas as a result of separate federal investigations into drug smuggling activities, but he was prosecuted only in Texas. The jury convicted Cauble on all counts contained in the indictment, and found that Cauble's share of Cauble Enterprises should be forfeited under the RICO criminal forfeiture provisions. The trial judge imposed a five-year sentence on Count One and concurrent five-year sentences on the other counts, and we affirmed his conviction. Cauble now seeks post-conviction relief and asks for a new trial on various bases.

II.

The first basis alleged by Cauble for a new trial is that FBI Agent Masterson intentionally testified falsely when he stated that *cash* funds were used to compensate

[1] For a more complete presentation of the facts, see the panel opinion on direct appeal, *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983).

for the overdrafts in January, when these deficits were actually covered by *checks*. Cauble argues that since the Assistant United States Attorney knew, or should have known of the falseness of the testimony, his conviction violates due process. Cauble further argues that Masterson's testimony was material, and that there is a reasonable likelihood that the false testimony could have affected the judgment of the jury.

The relevant facts regarding this issue are that on January 12, 1978, the Cauble Enterprises Special Account was overdrawn by $121,182. The account also showed a deficit balance on March 1, 1978. Cauble Enterprises deposited $113,900 cash to its Special Account in April 1978; $182,000 cash in May, and $124,300 cash in June. Cash deposits in 1978 totalled more than $692,000; cash deposits in 1977 amounted to approximately $220,000; in 1976 cash deposits were $14,600.

Masterson testified that he investigated the royalty, ranch and special accounts of Cauble Enterprises. During the direct examination, Masterson first explained a chart which graphically depicted the cattle sales made by Cauble Enterprises. He testified that there were some cash sales of cattle for which no receipts or bills of sale existed, nor were there any instructions regarding where the cattle were to be delivered; but when cattle sales were paid by check, there were such accompanying records. Masterson then testified regarding the Cauble Enterprises Special Account. He stated that in January of 1978 the Cauble Enterprises' special account had a $100,000 deficit which was compensated from "subsequent cash deposits" during the month of January. Masterson further testified that Cauble's records showed that the cash deposits came from "the sale of cattle, winning in Las Vegas and loan repayments."

Calling this testimony "perjured," Cauble claims that he is entitled to a new trial since the government used perjured testimony to obtain the conviction. The Supreme Court has held that deception of the court,

whether by presentation of evidence known to be false, failure to correct false evidence when it appears unsolicited, or suppression of material evidence, irrespective of the good or bad faith of the prosecution, violates due process, and a defendant who is convicted by the use of such evidence is entitled to a new trial. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The court in *Giglio* also noted, however, that a new trial is not automatically required. Thus, a new trial is not required when new evidence is not likely to change the verdict.

Similarly, the Supreme Court has held that the failure to disclose substantive evidence favorable to the defendant violates due process only if the omitted evidence creates a reasonable doubt that did not otherwise exist. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Consistent with *Giglio* and *Agurs*, the defendant must demonstrate: (1) that the statements were actually false; (2) that the statements were material; and (3) that the prosecution knew they were false, in order for a new trial to be granted based upon allegations that the government's case included perjured testimony. *United States v. Chagra*, 735 F.2d 870 (5th Cir. 1984); *United States v. Mack*, 695 F.2d 820 (5th Cir. 1983).

Here, we certainly are not convinced that, taken in context, Masterson made an intentionally false statement; indeed, it is arguable whether the testimony was false or simply ambiguous. Nevertheless, even if Masterson's testimony regarding the January 1978 deposit were false as Cauble alleges, we would still be unpersuaded that its use entitles him to a new trial since this statement, when considered in the context of his entire testimony, was not ultimately material to his conviction. In addition to discussing the January deposit, Masterson testified that cash deposits into the Special Account increased from $14,600 in the year 1976 to

more than $692,000 in the year 1978, and that cash deposits into another account designated as deposits from cattle sales, were not supported by bills of sales or shipping orders. This testimony was far more incriminating and damaging than Masterson's statement regarding the "cash," as opposed to "check" deposit in only one month over a two-to-three-year period.

Furthermore, the documentary evidence used to support Masterson's testimony was subpoenaed *from Cauble Enterprises*. At trial, Cauble testified that he reviewed the financial records examined by Masterson. We are fully convinced that Cauble's due process rights were not violated here, especially since he failed to cross-examine the witness and clear up any ambiguities or inaccuracies presented by the testimony. This conclusion is consistent with *United States v. Dean*, 722 F.2d 92 (5th Cir. 1983). In *Dean*, we held that there is no violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) where the information is fully available to the defendant, but he fails to obtain it from a lack of reasonable diligence.

III.

The next basis asserted by Cauble for obtaining a new trial is that the government failed to disclose the entire contents of its plea bargain agreement with Hawkins. Hawkins testified at trial that the government had agreed to remove a $110,000 lien against his ranch, and that it would prosecute only two of the six charges it had against him in exchange for his testimony. Cauble thus obviously knew this much of the agreement. Cauble argues, however, that the plea bargain also included: (1) an agreement that the government would not arrest or indict Hawkins' wife without first affording her the opportunty to obtain immunity by cooperating with the government; and (2) an agreement that the proceeds

from the sale of Hawkins' ranch would be placed in escrow and released after fulfilling the terms of the plea bargain.

Cauble asserts that under these alleged "newly discovered" facts he is entitled to a new trial on the basis of Fed.R.Crim.P. 33. Under this rule, in order to satisfy the prerequisites for a new trial, the defendant's motion must show: (i) the evidence was unknown to the defendant at the trial and is in fact newly discovered; (ii) the evidence is material; (iii) the nature of the evidence is such that it would probably produce a different result at a new trial, and (iv) the recent discovery of the evidence is in no wise attributable to a previous lack of diligence on the part of the movant. *United States v. Metz*, 652 F.2d 478 (5th Cir. 1978) (quoting *United States v. Geders*, 625 F.2d 31, 32-33 (5th Cir. 1980); *United States v. Antone*, 603 F.2d 566, 568-69 (5th Cir. 1978); *United States v. Hagerty*, 561 F.2d 1197, 1200 (5th Cir. 1977); *United States v. Cook*, 546 F.2d 82 (5th Cir. 1977); *United States v. Riley*, 544 F.2d 237, 240 (5th Cir. 1976), *cert. denied*, 430 U.S. 932, 97 S.Ct. 1554, 51 L.Ed.2d. 777 (1977); *Casey v. United States*, 522 F.2d 2065 (5th Cir. 1975); *United States v. Spivey*, 508 F.2d 1061, 1063 (5th Cir. 1976); *United States v. Rachal*, 473 F.2d 1338, 1343-44 (5th Cir. 1973); *United States v. Jacquillon*, 469 F.2d 380, 388 (5th Cir. 1972); *United States v. Stephenson*, 448 F.2d 768 (5th Cir. 1971)).

There was a written plea agreement that specifically discussed the escrow account (but contained no reference to any agreement with Hawkins' wife). But Cauble claimed that he never received a copy of the agreement. The district court found, however, that the government provided Cauble with a copy of the written plea agreement it had with Hawkins. This finding was based on the totality of the circumstances, including the fact that Cauble's trial attorney thoroughly cross-examined Hawkins on the specific details contained in the plea bargain, and even made reference to the plea bargain at

trial. The written plea-bargain agreement fully disclosed the terms of the escrow arrangement. The district court found that the escrow arrangement was disclosed to Cauble at trial, and therefore it could not serve as a basis for a new trial.

The district court credited the government's testimony that there was absolutely no promise made to Hawkins that his wife would not be prosecuted if he testified at trial. The district court also stated, however, that even if the government had undisclosed plea agreements with Hawkins, the failure to disclose this portion of the plea bargain was not material since it would have served only to further impeach Hawkins.

In reviewing the court's ruling on the plea agreement, we must recognize that a motion for a new trial is entrusted to the discretion of the trial judge, *United States v. Metz*, 652 F.2d at 478; *United States v. Riley*, 544 F.2d at 237, and "will be reversed only where it is shown that the ruling was so clearly erroneous as to constitute an abuse of discretion." *Antone*, 603 F.2d 566 (5th Cir. 1979). Reviewing the ruling under this standard, we do not find that the trial judge abused his discretion in denying Cauble's motion for a new trial since the district court was not clearly erroneous in either its finding that the escrow arrangement was disclosed prior to trial or that there was no agreement with Hawkins' wife as part of the plea bargain with the government.

Cauble argues, however, that the relevant inquiry is not whether there was an objective agreement between Hawkins and the government. but whether Hawkins had a subjective belief that he had reached such an agreement when he testified at trial. *See United States v. Onori*, 535 F.2d 938, 945 (5th Cir. 1978). We agree with the district court that it is unnecessary to determine whether Hawkins held such subjective belief since we are convinced that the disclosure of this information would not have produced a different result at trial. The jury was informed that Hawkins was testifying pursuant

to his plea-bargain agreement with the government, and receiving favorable treatment in exchange for his testimony, *see United States v. Dunbar*, 590 F.2d 1340 (5th Cir. 1979), and thus under the circumstances of this case, Cauble's argument gains him no points.

IV.

The third basis alleged for a new trial is that the government failed to disclose an oral statement given by Charles Katko that would have contradicted Hawkins' trial testimony. Hawkins testified that he gave Katko $15,000 for the use of Katko's trucks to haul marijuana, and that he obtained the $15,000 from Cauble through Charles Foster. Cauble alleges that this testimony was contradicted by Katko in a statement to federal agents in which he said that Hawkins had leased a truck from him on one occasion for the purpose of hauling hay, and that Hawkins paid him only $2,000 or $2,500. Cauble argues that this statement put the government on notice that either Hawkins or Katko was not telling the truth. He argues that the prosecution violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose this information.

The district court found, in effect, that Katko did not make such a statement to the government, and further found that in his written pretrial statement Katko did not deny receiving the $15,000 from Hawkins. Based on its review of the testimony, the district court held that because "the Government could not have foreseen, at the time of trial, that Katko would dispute Hawkins' testimony on this matter, the Government could not be guilty of knowingly using false or perjured testimony at trial." Additionally, the district court found that, at most, Katko's statement would have been cumulative impeachment of Hawkins. We hold that the district court was not clearly erroneous in its finding that Katko made no exculpatory statement to the government, and that

the district court did not abuse its discretion in denying Cauble's motion for a new trial on this basis.

V.

The final basis alleged by Cauble for a new trial is that the government failed to disclose information that Foster was involved in drug smuggling activities in the early 1970s. Cauble claims that this undisclosed fact was material to his defense. Cauble argued at trial that Foster used his, Cauble's, assets for drug smuggling and conducted the drug smuggling operations without his knowledge. The government rebutted Cauble's defense, arguing that Foster, because of his history of mental illness, was mentally incapable of managing the drug operation. Cauble contends that had the jury known, as the government knew, that Foster was previously involved in drug operations, the government's theory would have been undermined, and also his argument that Foster was the individual in control would have been strengthened.

The district court was correct that there was no *Brady* violation. First, there was no indication that the earlier evidence was exculpatory; that is, mere involvement in a drug operation does not show managerial capacity. Second, the evidence of previous drug dealings relied upon by Cauble occurred *before* Foster's mental problems were made evident, *see United States v. Ruppel*, 666 F.2d 261, 266 (5th Cir. 1981), *cert. denied*, 458 U.S. 1007 (1982) (defendant Foster acquitted by reason of insanity); thus, again this earlier evidence is not exculpatory of alleged mental incapacity upon which the prosecution relied, and *Brady* is not implicated. Consequently, we agree with the district court that the evidence concerning Foster's involvement in drug activities in the early 1970s does not serve to rebut the prosecution's theory, and does not constitute a *Brady* violation.

VI.

Our review of this appeal affirms Judge Rubin's conclusion that "Cauble had a fair trial. Trial counsel was able and diligent. The trial court's rulings were considered and impartial." We are convinced that Cauble raises no issue here which entitles him to a new trial. Accordingly, the district court is AFFIRMED.

U.S. COURT OF APPEALS
FILED
APR - 9 1985
GILBERT F. GANUCHEAU
CLERK

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2284

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

REX C. CAUBLE,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 12, 1985, 5 Cir., 198 , ____ F.2d____)

( )

Before CLARK, CHIEF JUDGE, GARWOOD and JOLLY, Circuit Judges

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly

United States Circuit Judge

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-897

REX C. CAUBLE,

Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 8, 1985.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 29th
day of May, 1985.

FILED
M. MAY 8, 1984
MURRAY L. HARRIS, CLERK
U.S. DISTRICT COURT
By LOUISE CARROLL
DEPUTY

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	NO. S-81-15-CR
	)	
REX C. CAUBLE	)	

ORDER

On this day came on for consideration the Motion For New Trial filed by Rex C. Cauble, defendant in the above entitled and numbered cause, and the Court having heretofore this day entered its Findings Of Fact And Conclusions Of Law in support of the denial of said motion, it is now therefore,

ORDERED, ADJUDGED and DECREED that both the Motion For New Trial filed by defendant Rex C. Cauble on January 23, 1984 and the Amended Motions For New Trial filed May 2 and May 4, 1984, are hereby, in all things, DENIED.

SIGNED this 8th day of May, 1984.

/s/ William M. Steger
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	NO. S-81-15-CR
	)	
REX C. CAUBLE	)	

ORDER

The Court having heretofore this day entered its Order denying the Motion For New Trial of Rex C. Cauble, defendant in the above entitled and numbered cause and having entered its Findings of Fact and Conclusions of Law in support of said Order, now deems it necessary to enter the following additional findings and orders in this cause, to wit:

Cauble has been under investigation by state and federal law enforcement agencies in at least two states for drug trafficking since 1977 or 1978. These investigations finally culminated in the return of indictments against Cauble in the Eastern District of New York and the Eastern District of Texas. The Eastern District of Texas indictment, returned August 7, 1981, was ultimately the case the Government chose to bring against Cauble. He entered his not guilty plea before this Court on August 17, 1981. At that time the Court allowed Cauble to be released on a $250,000 bond. Thereafter proceeded a period of intensive discovery and trial preparation by Cauble and by the Government. Cauble was brought to trial on January 12, 1982. A jury of his peers was selected and the evidence and arguments of the parties were presented to them. During the course of a nine-day trial, Cauble's trial counsel, Roy Minton, Charles Burton, G. Brockett Irwin, and Jack Gray ably and expertly defended him. Despite their best efforts, Cauble's

jury found him guilty as to all counts charged in the indictment on January 28, 1982. After acceptance of the verdict the Court consented to continue Cauble's previous bond.

On February 22, 1982, Cauble appeared before the Court for sentencing. After a lengthy hearing, the Court imposed sentence; Cauble was again permitted to remain free on bond pending an appeal of his conviction to the United States Court of Appeals for the Fifth Circuit. Notice of appeal was filed February 22, 1982, and subsequently Cauble filed extensive briefs with the Fifth Circuit in support of his points of error. On May 31, 1983, the Fifth Circuit, after fully considering the record and the briefs, handed down the decision on Cauble's appeal. Judge Alvin B. Rubin, writing for the panel in a scholarly 28 page opinion, affirmed this Court in all respects after exhaustively applying the applicable law to the facts that were developed at trial. Cauble's motion for rehearing before the Fifth Circuit was denied August 11, 1983.

A writ of certiorari was filed with the United States Supreme Court on October 7, 1983. This writ was subsequently denied by the Court on January 23, 1984.

Cauble returned to this Court on January 23, 1984, with a Motion For New Trial based upon evidence that was alleged to have been newly discovered and not available at his original trial. The Court, although not required to do so, granted Cauble's request for an evidentiary hearing on the new trial motion. Cauble was allowed in excess of two months to prepare for this hearing and had at his disposal the full subpoena power of this Court to compel the presence of witnesses and the production of documents. During this two-month period the Court reviewed all the briefs, affidavits, and exhibits filed by the parties with respect to the motion; each and every document submitted *in camera* to the Court by the Government was also intensely examined.

On March 27, 1984, the hearing on Cauble's Motion For New Trial commenced. At the two-day hearing a total of thirteen witnesses were called; included among those witnesses were the Government's chief prosecutor and chief F.B.I. agent in the case. Once again, Cauble was excellently represented by counsel, this time by Melvyn Bruder and Michael Tigar, attorneys who also represented Cauble on his appeal to the Fifth Circuit. Following this hearing, Cauble was allowed almost two weeks to submit to the Court his proposed findings of fact and conclusions of law on the Motion For New Trial and his arguments in support of same. The Court thereafter reviewed the 205 page transcript of the hearing, as well as the record of the prior trial, and the respective arguments, responses and proposed findings and conclusions of the parties. On May 8, 1984, the Court entered its findings of fact and conclusions of law and its order denying the motion.

As can be readily gleaned from the above information, Cauble has been allowed to remain unincarcerated since he was sentenced, some 26 months ago. When this Court received the mandate from the Fifth Circuit on February 6, 1984, it could have ordered Cauble to immediately begin serving his sentence, yet the Court again deferred sending Cauble to prison until it could determine if there was any merit to his new trial grounds. The Court has now considered those grounds and found them to be meritless. As a consequence, the Court is of the opinion that the time has now drawn nigh for Cauble to report to prison and begin serving his sentence. This is the Court's decision even if Cauble decides to appeal the ruling on his Motion For New Trial to the Fifth Circuit. In the event Cauble, in fact, decides to appeal the ruling on his new trial motion, the Court hereby enters these additional findings:

The Bail Reform Act embodies a strong presumption in favor of a defendant's request for bond pending appeal. 18 U.S.C. §§3146, 3148; *United States v.*

Provenzano, 605 F.2d 85, 90-91 (3rd Cir. 1979); *United States v. Stanley*, 469 F.2d 576, 580 (D.C. Cir. 1972); *see also Leary v. United States*, 431 F.2d 85, 88-89 (5th Cir. 1970). A defendant is to be released pending appeal unless the trial court finds that (1) no conditions of release will insure the defendant's appearance in court, (2) the defendant poses a danger to another person or to the community, or (3) it appears that an appeal is frivolous or taken for delay. *Id.*

Rule 9 of the Federal Rules of Appellate Procedure provides that if the district court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Although an argument could be made as to the fear that Cauble might flee because of the ever-increasing chances of his incarceration; absent some new information indicating Cauble is making imminent preparations to depart the United States, such a basis would not be a good one in that Cauble has been on appeal for such a lengthy time and has made all of his court appearances. Thus, it is apparent that any denial of a bond pending appeal would be principally based upon the frivolous nature of the appeal. When the Fifth Circuit considers Cauble's appeal from the denial of the Motion For New Trial, it is most likely that the following standard will be applied: "[A] district court has wide discretion in it's decision on a motion for a new trial, and we review that decision by an abuse standard." *United States v. Lauga*, 726 F.2d 1032, 1035 (5th Cir. 1984).

In *Smith v. United States*, 434 F.2d 612 (5th Cir. 1970) a bond denial was upheld as not being an abuse of the trial court's discretion where the defendant had already sought relief from his conviction, without success, all the way to the United States Supreme Court and was here merely instituting a new series of collateral attacks. In *Calley v. Callaway*, 496 F.2d 701 (5th Cir. 1974) it was held that an appeal bond should be granted to a military prisoner who is initiating habeas corpus attacks

only if the petitioner raises substantial constitutional claims upon which he has a high probability of success or in other exceptional circumstances where the bail is necessary to make the habeas remedy effective.

Under the abuse of discretion standard, and the holdings in *Smith* and *Colley*, the Court believes that Cauble will not have an expectation of success at the Fifth Circuit. The newly discovered materials which Cauble proposes entitle him to a new trial were thoroughly considered by this Court. After this review, it was determined that the Government had not withheld any *Brady* materials from Cauble. The matters raised by Cauble in the motion, if available at trial, would have at best only served to impeach two Government witnesses, Raymond Hawkins and William McKesson, who were effectively impeached by Cauble at trial. The rest of the materials could have only been used in an attempt to refute an impeachment of one of Cauble's character witnesses, Ben Neel, or to refute the Government's portrayal of Charles Foster as incompetent to manage a major drug smuggling operation without Cauble's help. While the Court is convinced these points were pressed in earnest and in good faith by Cauble, the Court must nevertheless find them to be frivolous and insubstantial when viewed against the overwhelming evidence adduced at trial that linked Cauble to narcotics smuggling.

Cauble had a fair trial before this Court, he had a fair review of this trial before the Fifth Circuit Court of Appeals and the United States Supreme Court, he had a fair hearing before this Court on his Motion For New Trial. Society has given Cauble his due; an unfettered opportunity to exercise the constitutional and statutory rights guaranteed criminal defendants in this country — it is now time for Cauble to pay his debt to society. It is, therefore,

ORDERED and DECREED that Rex C. Cauble, defendant in the above entitled and numbered cause, shall

surrender himself to the correctional institution designated by the United States Bureau of Prisons on May 22nd, 1984 at 10:00 AM. Pending this assigned date of surrender, the defendant will be allowed to remain free; such freedom, however, shall be conditioned upon the defendant securing a One Million Dollar ($1,000,000.00) bond. Said bond must be an approved corporate surety bond.

As additional conditions of release pending the defendant's surrender to the designated correctional facility, the Court shall require forfeiture of the defendant's United States passport, the defendant shall not be allowed to leave Denton County, Texas, without prior approval and permission of the Court, and the defendant shall be subject to bond supervision by the United States Probation Office for the Eastern District of Texas until such time as he duly surrenders.

SIGNED this 8th day of May, 1984.

/s/ William M. Steger

UNITED STATES DISTRICT JUDGE

FILED
M. MAY 8, 1984
MURRAY L. HARRIS, CLER
U.S. DISTRICT COURT
By LOUISE CARROLL
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA)		
	)	
VS.	)	NO. S-81-15-CR
	)	
REX C. CAUBLE	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 23, 1984, Rex C. Cauble, defendant in the above entitled and numbered cause, filed a Motion For New Trial with this Court. In the motion, Cauble claims that previously undisclosed information has come to light that affects the fairness and outcome of his trial. He further states that the bulk of this information is newly discovered and material to the issues in his trial, such that this evidence would have probably produced an acquittal on all charges against him. Cauble alleges that this newly discovered evidence was available and well known to the Government and was, despite its exculpatory nature, purposefully suppressed or misrepresented by the Government. Cauble then set forth the following eleven items of exculpatory information that were claimed to have been suppressed by the Government:

1. Numerous statements by Charles Katko and Ronald Ray Smith that directly conflict with Hawkins' testimony that Cauble invested money in Hawkins' smuggling operation.

2. Kitten Haver's statement and/or testimony that Hawkins and Foster were partners in a drug smuggling operation as early as 1973.

3. The government's promises to Hawkins that his wife would not be indicted for any relevant offenses.

4. The government's arrangement with Hawkins whereby the proceeds of the sale of his ranch would be subject to the government's control.

5. The information that Hawkins was criminally responsible, but not prosecuted for four murders in connection with drug smuggling in Florida.

6. Numerous statements by Katko, Ronald R. Smith, and Bill Morris that directly conflict with William McKesson's testimony regarding his March 1977 flight to Thomasville with Foster.

7. Knowledge that the Dimick report was not circulated with the DPS such that Ben Neel could have seen the report or known of its existence or contents.

8. Statements and testimony by several persons that Mr. Cauble was not involved in any drug smuggling including that under investigation in this case.

9. Statements by John Gray establishing a motive for testifying falsely against Mr. Cauble.

10. The substance of an investigation by the Georgia Bureau of Investigation (GBI) with respect to Hawkins.

11. The substance of numerous investigations by the DEA-NY in 1977 with respect to Hawkins.

The Government answered Cauble's Motion For New Trial on February 10, 1984, with a Statement of Facts and Memorandum of Law in opposition to Cauble's motion. The Government's opposition was supported by nine exhibits, two of which were affidavits of Bob Wortham, United States Attorney for the Eastern District of Texas, and Joseph Masterson, case agent for the Federal Bureau of Investigation. Also on February 10, the Government filed a motion requesting the Court to review certain documentary evidence *in camera*. The documents submitted to the Court *in camera* were as follows:

1. Charles W. Katko interview by the Federal Bureau of Investigation dated 11/09/81.

2. Drug Enforcement Agency report dated February 8, 1978 upon Charles W. Katko.

3. Interview of Ronald Ray Smith dated 4/20/78.

4. Interview of Ronald Ray Smith by Panama City Police Department on 3/21/78.

5. Undated and unsigned Ronald Ray Smith interview.

6. June 1, 1977 statement of Ronald Ray Smith.

7. Grand jury testimony of Ronald Ray Smith dated January 11, 1978.

8. Grand jury testimony of Eileen Haver dated November 17, 1978.

9. Grand Jury testimony of Bill Morris dated November 2, 1978.

10. Interview by Federal Bureau of Investigation of David Allen Dimick dated 4/22/82.

11. David Allen Dimick report dated 7/18/77.

12a. Federal Bureau of Investigation interview dated 1/12/81 of Floyd Byron Matthews

12b. Interview of Floyd Byron Matthews dated January 12, 1981.

12c. Grand Jury testimony of Floyd Byron Matthews dated January 2, 1979.

12d. Grand Jury testimony of Floyd Byron Matthews dated April 3, 1981.

13a. Interview of John M. Gray by Federal Bureau of Investigation dated 8/10/81.

13b. Interview by Federal Bureau of Investigation of William E. Trantham, attorney for John M. Gray dated 5/25/79.

14. Interview of John M. Gray by Federal Bureau of Investigation dated 9/02/82.

15. July 27, 1978 grand jury testimony of Charles Katko.

16. Grand jury testimony of Charles Katko dated August 16, 1978.

17. Grand jury testimony of Theran Ward dated November 21, 1978.

The above mentioned documents were, over the objection of Cauble, not disclosed and were viewed *in camera* by the Court. After thoroughly examining each and every document the Court, in an in-chambers conference with the attorneys for the respective parties on March 23, 1984, agreed to disclose to Cauble portions of the Government's *in camera* exhibits nos. 1 and 3. The remaining *in camera* exhibits were not disclosed to Cauble based upon the Court's tentative finding that they contained no exculpatory evidence and based upon the additional findings that Cauble was not entitled to view law enforcement investigative interviews and reports of witnesses who did not testify and that Cauble had not shown sufficient grounds to entitle him to override the traditional rule of nondisclosure regarding grand jury proceedings. On March 26, 1984, the Government tendered to the Court additional *in camera* material, that being the investigative file compiled by New York Drug Enforcement Agency personnel concerning Cauble. These documents were reviewed by the Court the night of March 26, 1984, and the Court determined that their contents would not be disclosed to Cauble for the same reasons the previous *in camera* submissions were not disclosed. The undisclosed Government *in camera* exhibits were later marked with new numbers and introduced as sealed hearing exhibits. For a correlation between the *in camera* exhibits submitted with the Government's motion and as finally numbered for hearing purposes, *see* Appendix "A" to these findings and conclusions.

On March 27, 1984, Cauble's Motion For New Trial came on for hearing before the Court. Attorney's for Cauble, in their opening statement to the Court (Hearing Tr. 6-8), outlined the six allegations on which they intended to proceed. These allegations, as related to the original New Trial allegations, were the "Katko" issue (Motion For New Trial allegation no. 1), the "plea bargain" issue (Motion For New Trial allegation no. 3), the

"Cherokee Ranch escrow" issue (Motion For New Trial allegation no. 4), the "Ben Neel" issue (Motion For New Trial no. 7), the "McKesson" issue (Motion For New Trial allegation no. 6), and the "Pre-1976 Foster-Hawkins relationship" issue (Motion For New Trial allegation no. 2 and a portion of no. 11). Cauble's attorneys represented that he was abandoning his Motion For New Trial allegations nos. 5, 8, 9, 10 and a portion of 11 (Hearing Tr. 206). Cauble attempted to raise another allegation on the second day of the hearing. This allegation was that F.B.I. agent Joseph Masterson testified falsely at Cauble's trial concerning the type of payments that were used to cover deficits in a special account Cauble maintained at the Western State Bank in Denton, Texas in January 1978.

In a May 2, 1984 amendment, Cauble contends that Raymond Hawkins told Lowell T. Miller, a Valley View, Texas banker, that the Government was forcing Hawkins to testify against Cauble by threatening to foreclose on his ranch and return further indictments against him, and that F.B.I. agent Masterson knew that Hawkins told Miller that Cauble was not involved in drug smuggling activities. The Court's fact findings on the impact of the Lowell T. Miller affidavit will be stated in conjunction with the findings on the "Katko" issue and the "plea bargain" issues. Another new allegation was raised May 4, 1984. Here Cauble claims one of his former employees, Bill Clifton, gave the Government information corroborating Cauble's explanation for the large amounts of cash deposited in his bank accounts during the years of the conspiracy. Cauble contends that Clifton did not come forward to testify on his behalf because the Government falsely told Clifton that Cauble had tried to have him murdered.

The Court after fully considering the *in camera* documents submitted, relevant portions of the trial transcript, the Motion For New Trial hearing transcript, the arguments, authorities and briefs of the parties, and the

proposed findings and conclusions received from the parties, now enters its findings of fact and conclusions of law. Each of Cauble's seven remaining allegations will be stated and the Court's fact findings as to each allegation will thereafter be set forth. Any finding of fact which constitutes a conclusion of law shall be deemed a conclusion of law and any conclusion of law which constitutes a finding of fact shall be deemed a finding of fact.

FINDINGS OF FACT

As to Cauble's allegation that the Government withheld exculpatory information, that being statements by Charles Katko and Ronald Smith that directly conflicted with Raymond Hawkins' testimony of having paid Katko $15,000 for the purpose of leasing trucks to haul marijuana from Georgia to New Jersey, the Court finds as follows:

1. Hawkins testified at Cauble's trial that in February 1977 he needed money to lease trucks to haul marijuana that was to shortly arrive in Georgia, that he obtained $25,000 for that purpose from Cauble via Charles Foster; and that he used $15,000 of this money to pay Katko for the use of Katko's trucks to haul marijuana (Trial Tr. 288-289).

2. At the hearing on Cauble's Motion For New Trial Katko testified that Hawkins agreed to furnish him 1,000 pounds of marijuana and Katko would be allowed to keep $25,000 out of the gross receipts of the marijuana he sold (Hearing Tr. 20-21). Katko stated Hawkins only leased one truck from him for $2,500 or $2,000 and that was for hauling hay and not marijuana; Katko claimed he never received $15,000 from Hawkins for the use of trucks to haul marijuana (Hearing Tr. 21-23).

3. Despite Katko's testimony at the Motion For New Trial hearing as to his dealings with Hawkins, there are

no prior statements made by Katko in Defendant's Hearing Exhibits Nos. 1, 2, 3 or Government *in camera* Hearing Exhibits Nos. 2-1, 2-10, 2-11, 2-13, 2-15 that refutes or materially conflicts with Hawkins' testimony that he paid Katko $15,000 for the lease of his trucks. Although these documents generally support the testimony of Katko as given at the hearing, he never denies receiving $15,000 from Hawkins for the lease of trucks.

4. There are no statements by Katko in Defendant's Hearing Exhibits Nos. 1, 2, 3 or Government *in camera* Hearing Exhibits Nos. 2-1, 2-2, 2-10, 2-11, 2-13, 2-15 that Cauble was not involved in drug smuggling. At best, the materials only reflect that Katko was not aware of Cauble's involvement in drug smuggling at the time he discussed selling marijuana for Hawkins in early 1977.

5. There are no statements made by Smith in Defendant's Hearing Exhibit No. 4 or Government *in camera* Hearing Exhibit Nos. 2-2, 2-3, 2-4, 2-5, 2-6, 2-14 that either conflict with Hawkins' testimony concerning his $15,000 payment to Katko or that state Cauble was not involved in drug smuggling activities.

6. The Court does not find to be credible any statement Hawkins may have made to Lowell T. Miller indicating Cauble was not involved in drug smuggling. The Court believes the sworn testimony of Hawkins detailing Cauble's involvement in the smuggling activities to be truthful.

7. Cauble never alleged, nor did he adduce any evidence, that the Government conducted any financial analysis of business records and other documents submitted by Katko to the United States Grand Jury for the Eastern District of New York.

8. The Government did not withhold any statements that would have tended to exculpate Cauble by showing Hawkins testified falsely in relation to his dealings with Katko in early 1977.

9. Hawkins was thoroughly and effectively impeached at Cauble's trial.

10. Even if the Government was in possession of evidence from Katko or Smith that directly conflicted with Hawkins' testimony regarding the $15,000 payment to Katko, the evidence merely concerns a minor point of the overall charged drug smuggling operation and could in no way have affected the outcome of the trial. The conflicting statements would only have served as cumulative impeachment material against Hawkins.

As to Cauble's allegation that the Government failed to disclose certain promises made to Raymond Hawkins in exchange for his plea of guilty, specifically a promise that Hawkins' wife, Karen Jacobs, would not be prosecuted and a promise that Hawkins' "Cherokee" ranch would not be forfeited, the Court finds as follows:

11. Government Hearing Exhibit No. 1 is the entire plea agreement between Hawkins and the Government; all of the Government's promises to Hawkins that were made in exchange for his plea of guilty are contained therein.

12. Government prosecutor David Baugh promised Hawkins that he would go to Jacobs first and give her an opportunity to cooperate before the Government indicted her or had her arrested. (Hearing Tr. 102).

13. Baugh never promised Hawkins that Jacobs would be granted immunity as *quid pro quo* for Hawkins' plea of guilty and for his cooperation and testimony against Cauble (Hearing Tr. 103, 108).

14. The testimony of Baugh that the nonprosecution of Jacobs was never promised to Hawkins is credible on this issue. Anything Hawkins may have told Lowell T. Miller to the contrary would not destroy or in any manner detract from Baugh's sworn testimony on this matter.

15. Any failure on the part of the Government to disclose its agreement to afford Jacobs a chance to cooperate before she was indicted or arrested would not have affected the ultimate outcome of the trial because this

evidence would only have gone to impeach Hawkins' testimony and, as the Court has previously found, Hawkins was thoroughly impeached at Cauble's trial.

16. At various times throughout the investigation of Cauble the Government believed it had a chance of obtaining a forfeiture of Hawkins' "Cherokee" ranch either under the R.I.C.O. statutes (Hearing Tr. 104) or based on a *Nebbia* hearing theory (Hearing Tr. 175 and Defendant's Hearing Exhibit No. 7).

17. However, from September 1, 1981, until January 5, 1982, the Government believed it could not have obtained a forfeiture of Hawkins' "Cherokee" ranch (Hearing Tr. 104).

18. The Government's decision not to forfeit Hawkins' "Cherokee" ranch was based on their lack of legal authority to do so and was not motivated by Hawkins' promise to testify against Cauble. Anything Hawkins may have related to Lowell T. Miller to the contrary would not change the Court's finding on this particular issue.

19. Any failure of the Government to apprise Cauble of its decision not to seek a forfeiture of Hawkins' ranch would not have affected the ultimate outcome of the trial because this evidence could only be used to impeach Hawkins' testimony.

As to Cauble's allegation that the Government failed to provide him with a copy of Raymond Hawkins' plea agreement prior to Hawkins' cross-examination, and in particular the allegation that Cauble was unaware of the Government's agreement with Hawkins whereby the proceeds of the sale of Hawkins' "Cherokee" ranch would be subject to the Government's control, the Court finds as follows:

20. The Government provided a copy of Government Hearing Exhibit No. 1, Hawkins' plea agreement with the United States, prior to Hawkins being cross-examined. The Court makes this finding based upon the totality of the circumstances surrounding this issue.

Specifically, the Court finds Government prosecutor David Baugh's testimony credible on this matter. The Cauble defense lawyers testified that "I am not telling you I am certain this (Government Hearing Exhibit no. 1) was never in our possession." (Hearing Tr. 149). Further, Cauble's defense lawyer cross-examined Hawkins in a manner which clearly reflected his prior access to Government Hearing Exhibit No. 1. Specifically, Hawkins was questioned concerning several of the exact details contained in the plea agreement and Cauble's defense lawyer made specific reference to the fact that he believed that he had the plea agreement "memorized," and then proceeded to cross-examine Hawkins concerning his plea agreement (Trial Tr. 408).

21. Government Hearing Exhibit No. 1 at paragraph 9 accurately sets forth the escrow arrangement between Hawkins and the Government concerning the proceeds of the sale of Hawkins' "Cherokee" ranch. Therefore, Cauble was aware at trial of an arrangement whereby the proceeds of the sale of Hawkins' ranch would be subject to Government control.

22. As a result of an earlier prosecution of Hawkins, a $110,000 lien was filed by the Government against Hawkins' interest in the "Cherokee" ranch. The Government's claim was still in effect at the time of Hawkins' testimony at Cauble's trial. Although the lien was still on file, it was null, void and of no effect due to the fact that Hawkins' conviction, which was the basis of the lien, was overturned by the Fifth Circuit Court of Appeals [*United States v. Hawkins*, 658 F.2d 279 (5th Cir. 1981)] prior to both Hawkins' entering into the plea agreement with the Government and his testimony at Cauble's trial.

23. At Cauble's trial, Hawkins testified that the Government would remove the $110,000 lien against the "Cherokee" ranch after he testified. (Trial Tr. 281). This

statement was true, not because the Government promised to release the lien as a part of Hawkins' plea agreement, but because the Government was legally obligated to release the lien after the reversal of Hawkins' conviction made the lien "not worth the paper it was written on." (Hearing Tr. 99).

24. Even if Cauble had cross-examined Hawkins in detail about the $110,000 lien or the escrow agreement, it would only have shown a bias against Cauble and an interest in seeing him convicted which would have merely impeached a witness (Hawkins) who the court has previously found was thoroughly impeached at trial.

As to Cauble's allegations that the Government improperly and in bad faith cross-examined Sergeant Ben Neel concerning whether he had seen a report prepared by David Dimick that implicated Cauble in marijuana smuggling activities, the Court finds as follows:

25. Dimick was interviewed by federal investigators and prosecutors in New York and asked how the Dimick report came into being (Hearing Tr. 65). Dimick advised them of how the report was prepared and of the restricted circulation of the report within the Texas Department of Public Safety due to its confidential nature (Hearing Tr. 66, 68-69). Dimick does not remember any federal agent asking him specifically about the extent of circulation of the Dimick report within Dimick's local group or unit (Hearing Tr. 69).

26. Government *in camera* Hearing Exhibit No. 2-9 contains no evidence bearing upon the question of the actual extent of circulation of the Dimick report or of whether Dimick ever related to the New York authorities the history of the report's dissemination within the Texas Department of Public Safety.

27. Prior to Cauble's trial, Neel was not a direct supervisor over Dimick (Hearing Tr. 63). However, at the time of cross-examination, Baugh believed that Neel was a direct supervisor over Dimick (Hearing Tr. at 180-181).

28. The credible testimony of Government prosecutor, David Baugh, reflects that he personally had no prior knowledge that Neel would not have had access to the Dimick report (Defendant's Hearing Exhibit No. 5) within the normal course of his duties (Hearing Tr. 181).

29. The Government's cross-examination of Neel at Cauble's trial was done in the good faith belief that Neel could have had access to and knowledge of the Dimick report.

30. Ben Neel testified at the trial as a character witness for Cauble. Any inadvertent misrepresentation the Government may have made while cross-examining Neel is insignificant in terms of its impact on the case as a whole and could not have affected the ultimate outcome of the trial.

As to Cauble's allegation that the Government improperly withheld exculpatory information, that being statements by Charles Katko, Ronald Smith and Bill Morris that directly conflict with William McKesson's testimony regarding his March 1977 airplane flight to Thomasville, Georgia with Charles Foster, the Court finds as follows:

31. The credible testimony of Government prosecutor, David Baugh, correctly sets forth the fact that statements of Katko, Smith and Morris do not pertain to or contradict the testimony of McKesson as it relates to Foster and McKesson flying to Thomasville, Georgia on March 2, 1977 (Hearing Tr. 175-177).

32. Defense Hearing Exhibits Nos 1, 2, 3, 4 and Government *in camera* Hearing Exhibits Nos. 2-1, 2-2, 2-3, 2-4, 2-5, 2-6, 2-8, 2-10, 2-11, 2-13, and 2-14 contain no information which would contradict McKesson's version of the March 2, 1977 Thomasville, Georgia airplane flight with Foster; in fact, the information contained within these exhibits are wholly inculpatory to Cauble and can in no way be considered exculpatory on the McKesson flight issue.

33. The testimony of McKesson at Cauble's trial was thoroughly impeached (Hearing Tr. 178-179), therefore, even if there had been any statements contradicting McKesson's version of the Thomasville flight that Cauble could have used on cross-examination, such statements would have served as merely cumulative impeachment material and could have had no possible bearing on the ultimate outcome of the trial.

As to Cauble's allegation that the Government improperly withheld exculpatory information, that being statements of Eileen "Kitten" Haver and Theran Ward that Raymond Hawkins and Charles Foster were partners in a drug smuggling operation as early as 1973, the Court finds as follows:

34. The Government never alleged or attempted to prove at Cauble's trial that he was involved in any drug smuggling operations with Hawkins and/or Foster prior to the dates contained in the indictment.

35. Hawkins admitted at Cauble's trial that he and Foster were involved in drug smuggling activities in the early 1970s. Defendant's Hearing Exhibits Nos. 1 and 2 merely corroborate this finding.

36. Credible, independent evidence adduced at Cauble's trial proved that Foster was mentally incapable of managing and operating a large scale drug smuggling operation, both in the early 1970's and during the time period charged in the indictment.

37. The Government did not have in its possession any information that indicated Foster was personally managing major drug smuggling operations in the early 1970s. Therefore, the Government did not, and could not have, suppressed any information that could be considered exculpatory to Cauble as it related to the Hawkins-Foster relationship prior to 1976.

As to Cauble's allegation that the Government failed to correct the false testimony of F.B.I. agent Joseph Masterson that Cauble covered overdrafts in a special account he maintained at the Western State Bank in

Denton, Texas with cash payments, when in truth they were covered by checks, the Court finds as follows:

38. Masterson did not testify falsely as to the January 1978 Western State Bank special account overdrafts. In any event, the evidence relied upon by Cauble to prove Masterson did not testify truthfully is not newly discovered.

39. The Government allowed Cauble access to the documentary evidence supporting his banking transactions on the special account. Not only was Cauble given access to the Government's documents concerning the special account, but the Government actually obtained these documents from Cauble pursuant to subpoena.

40. Cauble had the opportunity to fully cross-examine Masterson on his testimony concerning the January 1978 special account transactions and point out any discrepancies, but chose not to do so.

41. Cauble raised this exact issue in his reply brief to the United States Court of Appeals for the Fifth Circuit at page 14. By the appellate court's decision, it is apparent that there is no merit to Cauble's current complaint on this issue.

As to Cauble's allegation that the Government failed to disclose information from former Cauble employee, Bill Clifton, that Raymond Hawkins and Charles Foster were selling Cauble's cattle to fictitious persons for cash in order to "launder" money derived from narcotics smuggling and further that the Government took affirmative steps to prohibit Cauble from independently obtaining this evidence; specifically, that F.B.I. agent Joseph Masterson prejudiced Clifton from giving any favorable information to Cauble by intimating that Cauble had attempted to have Clifton murdered, the Court finds as follows:

42. Clifton never told Masterson or any other interviewing federal law enforcement agent that Foster and Hawkins wanted to invest cash into Clifton's cattle operation.

43. Clifton never told Masterson or any interviewing federal law enforcement agent that Foster was investing cash in Cauble's cattle operation in order to "launder" profits from marijuana smuggling ventures.

44. Clifton never told Masterson or any other interviewing federal law enforcement agent that Foster was making cash sales of Cauble's cattle to Hawkins and other drug smugglers and furnishing Cauble with the names of buyers whose identities were purposefully false to prevent detection of what Foster was doing.

45. Masterson did ask Clifton if he felt that Cauble had any involvement in Clifton's 1978 shooting. However, Masterson did not state, or attempt to suggest that Cauble was, in fact, the person responsible for the shooting. Masterson merely stated that the shooting of Clifton might be solved during the course of the Government's investigation into Cauble-related drug smuggling. In fact, Clifton in his affidavit stated he believed that some former drug suspect he had investigated had shot him.

46. Neither Masterson, nor any other Government agent in any way inhibited Clifton from coming forward to testify in Cauble's behalf by intimating Cauble had tried to have Clifton killed.

CONCLUSIONS OF LAW

The Government is under a constitutional duty to provide exculpatory evidence to a defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). To establish a *Brady* violation, a defendant must prove that the Government suppressed evidence, that the suppressed evidence was favorable to the defendant, and that the evidence suppressed was material. *United States v. Sink*, 586 F.2d 1041 (5th Cir. 1978), *cert. denied* 443 U.S. 912 (1979).

In addition to the obvious and simplistic application of the general rule of *Brady* that the Government may not suppress material evidence favorable to an accused,

several other, more sophisticated offshoots of the rule exist which bear mention because of their alleged application to this case. The Government may not knowingly use false evidence to secure a conviction, *Mooney v. Holohan*, 294 U.S. 103 (1935), nor may the Government permit unsolicited false evidence to be used without correcting it. *Napue v. Illinois*, 360 U.S. 264 (1959). Moreover, these rules apply not merely to evidence that explicitly exonerates an accused; they apply where false or suppressed evidence tends to corroborate a defensive contention, *Alcorta v. Texas*, 355 U.S. 28, 31 (1957), tends to refute a prosecution theory, *Pyle v. Kansas*, 317 U.S. 213, 215 (1942), or impeaches the credibility of a material witness. *Giles v. Maryland*, 386 U.S. 66, 75 (1967); *Napue, supra* at 269. The Government must also disclose to the defendant any promises or agreements it has made with crucial Government witnesses in exchange for their testimony since any such understandings would affect the witness' credibility. *Giglio v. United States*, 405 U.S. 150 (1972). A synthesis of the holdings in *Napue* and *Giglio* is presented in the case of *United States v. Barham*, 595 F.2d 231 (5th Cir. 1979) wherein the court found that the terms of a crucial Government witness' plea bargain was not disclosed, in essence, because the Government allowed a false version of the terms of the leniency agreement to be presented to the jury without attempting to correct it.

If the Government has unlawfully suppressed favorable evidence, hence a *Brady* violation, the issue then becomes that of whether the violation is material and would warrant a new trial. *United States v. Agurs*, 427 U.S. 97 (1976) recognizes three types of situations:

> 1. if the prosecution has knowingly used false or perjured testimony then the conviction must be reversed "if there is any reasonable likelihood that the false testimony could have affected the outcome of the jury." *Agurs, supra* at 103;

2. if the defense specifically requested the particular item and the Government did not disclose it, then the conviction must be reversed if such evidence might have affected the outcome of the trial. *Agurs, supra* at 104;

3. if the defense made only a general request or no request at all for exculpatory information and the Government does not disclose such, then the conviction must be reversed if the suppressed evidence "creates a reasonable doubt that did not otherwise exist. . ." *Agurs, supra* at 112.

In *Garrison v. Maggio,* 540 F.2d 1271 (5th Cir. 1976), *cert. denied* 431 U.S. 940 (1977) a fourth set of circumstances surrounding a *Brady* violation was set forth. Where the suppressed evidence is merely impeaching, a reversal is warranted only if the new evidence "probably would have resulted in an acquittal." *Garrison v. Maggio, supra* at 1274. As stated in *Ogle v. Estelle,* 641 F.2d 1122, 1126 n.2 (5th Cir. 1981), "impeachable evidence . . . is not necessarily false (perjured) evidence."

Cauble first alleges that the Government failed to disclose to him statements of Charles Katko and Ronald Smith that indicate Raymond Hawkins never paid Katko $15,000 for handling a marijuana transaction in March of 1977 in New Jersey. None of the Government interviews or statements of Katko and Smith reviewed by the Court contain denials of Hawkins' testimony that he paid Katko $15,000 for the lease of trucks to haul marijuana. These statements simply do not address this particular aspect of the Hawkins/Katko connection. Since the statements are silent as to the $15,000 payment and the Government could not have foreseen, at the time of trial, that Katko would dispute Hawkins testimony on this matter, the Government could not be guilty of knowingly using false or perjured testimony at trial. Assuming for arguments sake that the Government should have provided Cauble with the Katko and Smith statements they

would have served at most as merely cumulative impeachment of Hawkins, a witness who was already thoroughly and effectively impeached. There is nothing exculpatory in the Katko and Smith statements.

Cauble's contention that the Government should have provided Katko's business records to confirm or deny Hawkins' testimony are meritless since there is no indication that the records were ever analyzed and that the Government knew it would prove Hawkins lied. Even if those records had been analyzed and they revealed a $2000 or $2500 payment to Katko from Hawkins and made no mention of a $15,000 payment from Hawkins, such would not be sufficient to have put the Government on notice that Hawkins was lying since it can be reasonably assumed that a payment to lease trucks for the purpose of illicit drug transportation would not ordinarily be recorded in a company's financial records.

A careful review of the Charles Katko and Ronald Smith Government interviews reveals that all such information was inculpatory to Cauble; that it did not contradict Hawkins' testimony; and that it was in no way exculpatory. There was no *Brady* violation, hence the Motion For New Trial is denied on this point. Even if the Court were to have found a *Brady* violation, whether applying any of the three *Agurs* standards or the *Garrison v. Maggio* test, a new trial would not be warranted.

Cauble claims the Government failed to disclose certain promises made to Raymond Hawkins in exchange for his testimony against Cauble. These promises included nonprosecution of Hawkins' wife, Karen Jacobs, and nonforfeiture of his "Cherokee" ranch. The Court has chosen to accept as credible the Government's testimony that there was absolutely no promise made to Hawkins that his wife would not be prosecuted if he testified against Cauble. The Court has also chosen to accept the Government's statement that its decision to refrain from attempting to obtain a forfeiture of Hawkins'

ranch was not based on any promise to Hawkins concerning his testimony at Caubles trial; but was instead based upon the Government's opinion that it no longer had any legal authority to justify forfeiture.

The Court has chosen not to believe anything Hawkins may have told his banker, Lowell T. Miller, concerning his dealings with the Government. The Court simply finds the testimony of David Baugh, which was given under oath and in the presence of the Court, to be more trustworthy on the issue of what Hawkins was promised than the unsworn and hearsay statements of a person (Hawkins) whose credibility is already in serious doubt. Since there were no promises ever made to Hawkins by the Government regarding his wife or his ranch forfeiture, there can be no violations of the *Brady* rule as it applies to *Giglio* situations. Therefore, the new trial motion is meritless on this issue.

Even assuming, arguendo, that the Government did have undisclosed plea agreements with Hawkins regarding his wife and his ranch in violation of *Brady*, such evidence, if it had been properly disclosed, would have only served to impeach Hawkins' testimony. Consequently, the materiality of these revelations would have been very slight due to the fact that Hawkins had already been thoroughly impeached with other evidence. The *Agurs* and *Garrison v. Maggio* standards of materiality of suppressed favorable evidence cannot be met.

Cauble claims that he was not provided a copy of Hawkins' plea agreement and he was not aware of the Government's escrow arrangement on Hawkins' "Cherokee" ranch. The Court has found that Cauble was in fact provided the Hawkins plea agreement prior to his cross-examination; as such, it is readily apparent that Cauble was aware of the escrow arrangement at trial. Since the arrangement was disclosed to Cauble it cannot serve as basis for a new trial based on a violation of the *Brady* rule.

Cauble's contention that the escrow arrangement constituted an improper contingent fee agreement is meritless. *Williamson v. United States*, 311 F.2d 441, 444 (5th Cir. 1962) prohibits contingent fee witness arrangements where the witness is "to produce evidence against particular named defendants as to crimes not yet committed." Hawkins' plea agreement was entered into *after* Cauble had been indicted. More importantly, Cauble had the plea agreement and was given ample opportunity to inquire about the specifics of the escrow arrangement on cross-examination.

Cauble claims that the Government had an undisclosed agreement with Hawkins to release a $110,000 lien on his ranch in return for his testimony against Cauble. The Court has found that the Government did agree to release this lien. However, that agreement was based upon the fact that the Government no longer had any legal right to encumber the property and not because Hawkins, as part of his plea bargain, agreed to testify against Cauble. Since the agreement to release the lien was not part of Hawkins' plea agreement, the Government did not violate the *Giglio* rule by failing to disclose the release agreement to Cauble. Nor did the Government fail to correct false testimony, because Hawkins was, in fact, being truthful when he stated that the $110,000 lien would be removed from his ranch.

Therefore, *Napue v. Illinois, supra,* is not applicable, nor is *United States v. Barham, supra,* implicated. In fact, the lien release arrangement in this case is the exact converse of the situation in *Barham,* i.e., the Government there allowed false testimony to be elicited regarding matters contained in a plea agreement; however, in this case, the Government allowed truthful testimony to be elicited about a matter that had nothing to do with a plea agreement.

Regardless, the lien release merely served to further impeach Hawkins' reason for testifying in the manner he

did and could not have possibly damaged Cauble's defense. There was no *Brady* violation with respect to the escrow agreement or the release of the lien, and even assuming arguendo, a *Brady* violation, whether applying the materiality tests of *Agurs* or *Garrison v. Maggio,* no new trial is warranted.

Cauble also claims that the Government cross-examined Sergeant Ben Neel on his knowledge of the Dimick report, when it knew that Neel had not seen the report. The Court has found that certain New York law enforcement personnel were generally aware of the Dimick report's limited circulation within the Texas Department of Public Safety, but that Dimick never specifically told them that Neel could not have seen the report. The Government, even if it had been aware of the New York information, could have in good faith believed that Neel could have had an opportunity to see the Dimick report and the Court has, in fact, found that the Government cross-examined Neel on this issue based upon that good faith belief.

It is also important to note on this issue that the cross-examination concerning the Dimick report went merely to impeach Neel's character testimony. In no way was the alleged improper cross-examination offered or admitted as substantive evidence of Cauble's guilt of the charged offenses. Moreover, Neel was merely one of many impressive character witnesses for Cauble. The casting of doubt on Neel's knowledge about all of Cauble's activities could not have possibly affected the ultimate outcome of the trial in light of the overwhelming evidence of guilt. Cauble has not presented to the Court any evidence that the Government knowingly used false evidence to impeach one of his character witnesses. This issue cannot withstand the *Agurs* or *Garrison v. Maggio* standards and, accordingly, the Motion For New Trial must be denied as to this point.

Cauble claims that the Government failed to disclose exculpatory and impeaching testimony pertaining to

William McKesson's account of the March 2, 1977 flight to Thomasville, Georgia with Foster. The information at issue, statements of Katko, Smith and Morris, make no reference to the facts at issue, hence this was no *Brady* violation. All of the statements merely served to inculpate Cauble. Even were the Court to accept that the statements do, in fact, contradict McKesson's testimony, they serve merely to impeach a witness who was thoroughly impeached and they in no way show the use of knowingly false or perjured testimony by the Government. Whether applying *Agurs* or *Garrison v. Maggio*, there is no basis for a new trial on this issue.

Cauble next contends that the Government's failure to reveal the nature of Hawkins' and Foster's dealings in controlled substances in the early 1970's constitutes a *Brady* violation serious enough to warrant a new trial. Cauble was never alleged to be involved in a drug conspiracy ongoing in the early 1970's, much less with Hawkins and Foster. Hawkins freely admitted smuggling controlled substances in the early 1970's and that he paid Foster for unloading a couple of boats. Cauble's principal complaint is that the Government had information that Hawkins and Foster paid Eileen "Kitten" Haver $25,000 to travel to Mexico on their behalf and deliver a large sum of money arising out of drug smuggling. Cauble further contends that Theran Ward's statements constitute exculpatory information. Ward merely confirms Haver's Mexico trip and points out Ward's belief that Foster was a "bagman" for drug smugglers based in Florida. Under the circumstances such could hardly be considered the kind of evidence that rises to a *Brady* violation.

Independent evidence clearly established that Foster was mentally incapable of managing and operating a major drug smuggling operation, either during the early to mid-1970's or during the time period alleged in the Cauble indictment. *See United States v. Ruppel*, 666 F.2d 261, 266 (5th Cir. 1981) *cert. denied* 458 U.S. 1107

(1982) (defendant Foster acquitted by reason of insanity). The Government, under no circumstances could be expected or required to pile inference upon inference in order to determine that by some stretch of the imagination Cauble would treat such information as exculpatory. Hawkins, as stated before, was thoroughly impeached, and his testimony was not the linchpin upon which Cauble's conviction was obtained. The facts concerning Foster's mental condition effectively rebut any type of argument under *Pyle v. Kansas, supra,* that the pre-1976 relationship between Foster and Hawkins refute a prosecution theory, i.e., that Foster was the mastermind of the smuggling organization and Cauble was his dupe. There was no *Brady* violation with respect to information concerning Hawkins' and Foster's pre-1976 relationship. Even if there was a *Brady* violation, the materiality standards of *Agurs* and *Garrison v. Maggio* could not be met. The Motion For New Trial is denied as to this issue.

Cauble also claims that F.B.I. agent Joseph Masterson intentionally lied at trial by testifying that overdrafts in a special account maintained by Cauble at the Western State Bank in January 1978 were covered by cash deposits. Cauble contends he has documentary evidence that conclusively proves the overdrafts were covered by checks instead of cash. Even if the Court were to find that Masterson misrepresented the January 1978 bank transactions, the tools with which to destroy Masterson's testimony on this issue, as well as his general credibility, were in the hands of Cauble at trial. These tools were the documents which the Court has found Cauble had complete access to throughout the trial. Since these documents were disclosed to Cauble, they cannot be considered "newly discovered" for purposes of sustaining a motion for new trial, nor can they be considered as "suppressed" for *Brady* purposes. The Motion For New Trial is denied on this point.

Finally, Cauble has raised two new allegations by way of amended new trial motions filed May 2 and May

4, 1984. The May 2 evidence, the Lowell T. Miller affidavit, has already been discussed in these conclusions since it related to issues raised by Cauble in his original new trial motion. However, the May 4 evidence, the Bill Clifton affidavit, concerned matters not raised in Cauble's original motion or at the hearing. The Court will now state its legal conclusions regarding the Clifton fact findings. Before revealing these conclusions, however, the Court finds it necessary to cite the authority which it perceives entitles the Court to determined contested fact issues on a motion for new trial based solely on affidavits and not an evidentiary hearing. The Court intends this authority to buttress its fact findings not only on the Clifton evidence, but the Miller evidence as well.

An evidentiary hearing need not be held in every case where a defendant seeks a new trial on the basis of newly discovered evidence. *United States v. Johnson,* 327 U.S. 106, 112 (1946); *United States v. Provezano,* 521 F.Supp. 403, 408 (D.N.J. 1981), *aff'd* 681 F.2d 810 (3rd Cir. 1982). The law of this circuit is well established that a motion for new trial may ordinarily be decided upon affidavits without an evidentiary hearing. *United States v. Simmons,* 714, F.2d 29, 30 (5th Cir. 1983); *United States v. Metz,* 652 F.2d 478, 481 (5th Cir. 1981); *United States v. Johnson,* 598 F.2d 147, 148 (5th Cir. 1979); *United States v. Dara,* 429 F.2d 513, 514 (5th Cir. 1970); *Guereski v. United States,* 405 F.2d 253, 267 (5th Cir. 1968). Of course there may be exceptional circumstances in which an oral hearing should be granted. *Lyles v. United States,* 272 F.2d 910, 912 (5th Cir. 1959). Where evidentiary hearings are ordered, it is because of certain unique situations typically involving allegations of jury tampering, prosecutorial misconduct or third party confessions. *United States v. Hamilton,* 559 F.2d 1370, 1373 (5th Cir. 1977).

Even when, as here, governmental misconduct of some type is alleged, it is not improper for the district

court to waive a hearing and decide the matter on affidavits. *United States v. Turner*, 409 F.Supp. 583, 600 (E.D.Mich. 1979); *see United States v. Nace*, 561 F.2d 763, 772 (9th Cir. 1977) (trial court was not required to hold a hearing on new trial motion based on alleged governmental suppression of exculpatory evidence; it was not abuse of discretion to proceed by way of affidavits); *see also United States v. Slocum*, 707 F.2d 587, 600 (11th Cir. 1983) (decision of trial court not to hold an evidentiary hearing on allegations that Government violated *Brady* rule is within trial court's sound discretion, subject to review only for abuse of that discretion). However, there are limits to this discretion, especially when prosecutorial misconduct is alleged. An evidentiary hearing may be necessary to insure an adequate record on which to base an enlightened ruling. *United States v. Disston*, 582 F.2d 1108, 1110-1112 (7th Cir. 1978).

United States v, Curry, 497 F.2d 99 (5th Cir. 1974), involved a motion for new trial based on the allegation that the Government knowingly used perjured testimony to convict the defendant. In affirming the district court's decision to overrule the motion without a hearing, the Fifth Circuit pointed out that the new evidence bore solely on the credibility of witnesses. Citing *Gurleski, supra*, they noted that appellate courts are particularly cautious about reversing denials of motions for new trial where the newly discovered evidence relates solely to matters of credibility of witnesses against the accused. *Curry* at 101. Furthermore, the court went on to hold that the insights gained by the presiding judge during the course of the trial make him exceptionally qualified to pass on affidavits supporting a new trial motion. *Id.* This points up the general rule that the necessity for a hearing is diminished in cases involving challenged testimony where the trial judge has an opportunity to observe the demeanor and weigh the credibility of the

witnesses at trial. *See United States v. Ward*, 544 F.2d 975, 976 (8th Cir. 1976); *accord Hamilton, supra*, at 1372-1374.

Cauble claims that Bill Clifton related to federal law enforcement agents that Foster told him that he was selling Cauble's cattle to Hawkins and other drug smugglers in exchange for cash which they had earned from drug smuggling, all without Cauble's knowledge or consent. Cauble further alleges that not only was this favorable evidence not disclosed by the Government, but also that the Government attempted to keep Cauble from discovering this information by telling Clifton that Cauble had earlier tried to have him killed, thereby prejudicing Clifton against Cauble. The Court has found that Clifton never told any government agent that Foster was selling Cauble's cattle for cash in order to "launder" profits derived from narcotics trafficking. This finding was based on a review of the pertinent law enforcement documents and the credible affidavit of agent Joseph Masterson. Due to various statements in Clifton's affidavit that are inconsistent with statements made in previous Government interviews, the Court determines that Clifton's affidavit is not credible.

The Court is also of the opinion that agent Masterson did not attempt to dissuade Clifton from relating any favorable evidence to Cauble or testifying in Cauble's behalf at trial by stating or suggesting that Cauble had attempted to have him killed. Therefore, the Government did not knowingly attempt to conceal material exculpatory evidence from Cauble by lying to a potential favorable witness. There was no *Brady* violation as it pertains to the Clifton affidavit because there was never any favorable evidence that existed that could have been suppressed. There was also no misconduct associated with the Government's interviews with Clifton in regards to

the issue of who could have attempted to kill him. Therefore, there is no merit to this last issue raised by Cauble and the new trial motion will, accordingly, be denied on this point.

The evidence which convicted Cauble was overwhelming and simply could not be refuted. The thrust of Cauble's Motion For New Trial is directed at Hawkins' testimony and its impact upon the verdict, but considering the totality of the evidence Hawkins was simply not critical to the ultimate finding of Cauble's guilt. Among the evidence were thousands of documents inexorably proving Cauble's guilt; damning admissions from Cauble's own mouth on cross-examination; testimony regarding Foster's mental condition and Cauble's stream of improper loans to Foster which were used to finance the smuggling operation; proof that there were no cash cattle sales, contrary to what Cauble told the government in an effort to explain the huge amounts of cash he deposited in his account at Western State Bank during the years of the conspiracy. None of the newly discovered evidence in any way impugns the basic fact, admitted by Cauble at trial, that Cauble Enterprises' ranches, airplane, banks, Houston apartment and employees were used over and over again by the drug smugglers to further the conspiracy and that Cauble was in frequent personal contact with the smugglers. In short, Hawkins' testimony was almost superfluous, and in view of his obvious lack of credibility at trial, it was probably given little, if any, weight in the jury's deliberations.

This Court has carefully and painstakingly reviewed the evidence and simply put, the Government provided Cauble all of the discovery that he was entitled to. At all times the Government acted in good faith in its actions throughout the Cauble prosecution.

> Cauble had a fair trial. Trial counsel was able and diligent. The trial court's rulings were considered and impartial . . . the evidence sufficed to persuade a reasonably jury. Its verdict is, in the ancient words, the verdict of the country. *United States v. Cauble,* 706 F.2d 1322, 1356 (5th Cir. 1983).

Based upon the foregoing findings of fact and conclusions of law the Court will deny, in all respects, defendant Rex C. Cauble's Motion For New Trial filed January 23, 1984, and his Amended Motions For New Trial filed May 2 and May 4, 1984.

LET AN ORDER ENTER ACCORDINGLY.
SIGNED this 8th day of May, 1984.

William W. Stegel
UNITED STATES DISTRICT JUDGE

APPENDIX A

CORRELATION TABLE OF *IN CAMERA* EXHIBITS

Government Motion To Review Documentary Evidence *In Camera* exhibit number:	Evidentiary Hearing exhibit number:
1	Defendant's Hearing Exhibit No. 3
2	Government Hearing Exhibit No. 2-1
3	" 2-2
4	" 2-3
5	" 2-4
6	" 2-5
7	" 2-6
8	2-7
9	" 2-8
10	" 2-9
11	Defendant's Hearing Exhibit No. 5
12	Allegation abandoned
13	Allegation abandoned
14	Allegation abandoned
15	Government Hearing Exhibit No. 2-10
16	" 2-11
17	" 2-12

(2)

No. 85-34

Supreme Court, U.S.
FILED
OCT 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

REX C. CAUBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's motion for a new trial, based on allegations of newly discovered evidence, was properly denied by the courts below.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. Al-All) is unreported. The opinions of the district court denying petitioner's motion for a new trial (Pet. App. A22-A49) and terminating his conditional release (Pet. App. A16-A21) are also unreported. An earlier opinion of the court of appeals affirming petitioner's conviction is reported at 706 F.2d 1322.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1985. A petition for rehearing was denied on April 9, 1985 (Pet. App. A12-A13). On May 29, 1985, Justice White extended the time for filing a petition for a writ of certiorari to July 8, 1985 (Pet. App. A14), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted of three counts charging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a), (c) and (d). He was also convicted of three counts charging violation of the Travel Act, 18 U.S.C. 1952, and four counts charging misapplication of bank funds in violation of 18 U.S.C. 656. Petitioner was sentenced to concurrent terms of five years' imprisonment on all ten counts and was also ordered to forfeit his interest in Cauble Enterprises, a business partnership, under the RICO forfeiture provisions. The court of appeals affirmed his conviction, 706 F.2d 1322 (1983), and this Court denied certiorari, (465 U.S. 1005 (1984)).

On January 23, 1984, petitioner filed a motion for a new trial based on newly discovered evidence, pursuant to Fed. R. Crim. P. 33. Following full briefing and a hearing, the district court denied the motion. The court of appeals affirmed.

1. The evidence at trial is set out in the opinion of the court of appeals affirming petitioner's conviction, 706 F.2d at 1335-1339, and is briefly discussed in its later opinion affirming the district court's denial of petitioner's motion for a new trial (Pet. App. A3). Briefly stated, the evidence showed that petitioner engaged with others in a scheme to operate Cauble Enterprises through a pattern of racketeering activity involving the importation of large quantities of marijuana from Colombia to the United States. The existence of a conspiracy and the involvement of several Cauble Enterprises employees—including Charles "Muscles" Foster, petitioner's ranch foreman—was never disputed at trial (see, *e.g.*, 706 F.2d at 1335; Tr. 209-211, 225).

In February 1977, petitioner began lending Foster substantial sums of money. 706 F.2d at 1335. Foster, in turn, lent money to Raymond Hawkins (*ibid.*; Tr. 288-289, 304, 308). Over the next two years, Foster and Hawkins conducted a series of marijuana smuggling ventures. 706 F.2d at 1335-1338. Prior to these ventures, petitioner had never lent money to Foster; however, after the illegal activities began, petitioner lent or arranged for loans to Foster that totalled $225,000 (Tr. 549-562, 603-611, 999-1000; GX 48). For example, in 1978 petitioner arranged for the Western State Bank of Denton, Texas—of which Cauble Enterprises owned 87%—to lend Foster over $87,000, a large portion of which was unsecured (Tr. 559, 563). Another Texas bank, of which petitioner was a director, granted Foster an unsecured $10,000 loan at petitioner's request (Tr. 679-686). Petitioner also arranged for a bank loan to be made to Hawkins (Tr. 258).

In addition to providing financial support, petitioner participated in the marijuana smuggling in other ways. He furnished transportation to Foster, Hawkins, and other conspirators in his private airplane (706 F.2d at 1336-1337; Tr. 245, 247, 312, 371-376, 1182-1183, 1191-1192, 1304-1305, 1308-1317, 1341-1347), or paid the airfare when conspirators flew commercial airlines on drug-related business (Tr. 433-434, 1185, 1194-1196; GX 35). The L.R. Ranch, owned by Cauble Enterprises, became a storage and distribution site for one multi-ton marijuana load (706 F.2d at 1336; Tr. 253-255, 1658-1671, 1735-1736), and two other Cauble Enterprises ranches became storage sites for other loads (706 F.2d at 1338; Tr. 265-268, 513-528, 1053, 1058-1068, 1070, 1076-1078, 1667-1668). Cauble Enterprises employees drove truckloads of marijuana (706 F.2d at 1336 n.39, 1338 nn. 49 & 50; Tr. 277), and on several occasions conspirators met in an apartment leased by a Cauble Enterprises business (706 F.2d at 1337; Tr. 516,

049-1050). Petitioner also lent the conspirators money to erect a privacy fence around an offload site (Tr. 337-338) and was involved in the quest for a shrimp boat that was used to smuggle marijuana (706 F.2d at 1337).

Other evidence at trial further established that petitioner participated in the marijuana smuggling activities. Petitioner and Cauble Enterprises received substantial and unexplained sums of money during the period of the conspiracy (706 F.2d at 1338-1339); the timing of these receipts corresponded closely to the arrival of marijuana-laden ships. Hawkins paid Foster $250,000 in petitioner's home, while petitioner was present, and Foster immediately handed half of that money to petitioner (706 F.2d at 1336 & n.42; Tr. 231-233, 285-287). Foster and Hawkins discussed marijuana smuggling in petitioner's presence (Tr. 284), and Hawkins and another co-conspirator testified at trial that petitioner knew of the smuggling (706 F.2d at 1336 n.42, 1338-1339; Tr. 234-235, 253, 263, 1089-1093, 1107-1109, 1153-1154). Petitioner assisted Hawkins in laundering money at a Las Vegas casino (706 F.2d at 1337; Tr. 257, 260-261, 378-382, 1039-1040, 1214-1218), and petitioner arranged for himself, Foster, and Hawkins to be placed on a list of persons exempt from the currency transaction reporting requirements of the Bank Secrecy Act, 31 U.S.C. 5313, even though none met the legal criteria for placement on the exemption list (Tr. 996, 1365-1389). As a result, they (and Cauble Enterprises) could make cash deposits in excess of $10,000 that would not be reported automatically to the federal government.

In sum, there was voluminous evidence of petitioner's complicity in the marijuana smuggling activities. See 706 F.2d at 1339-1343.

2. On the day that this Court denied review of the judgment affirming the original conviction, petitioner filed a motion for a new trial in the district court based upon 11

items of "newly discovered" evidence that he alleged were exculpatory, would probably produce an acquittal on all charges, and were deliberately withheld from the government before and at trial (Pet. App. A22-A23; 5 R. 1395-1431). Petitioner ultimately relied upon only six of those items (Pet. App. A25-A26; 6 R. 2275; 7 R. 206), to which he added two others in subsequent amended motions (Pet. App. A26; 6 R. 2219-2227, 2232-2242, 2276).

Petitioner claimed that the government withheld evidence that directly conflicted with or impeached the testimony of key prosecution witnesses. In particular, petitioner claimed in his motion that "numerous statements" by Charles Katko, who did not testify for either side at petitioner's trial, "directly conflict with Hawkins' testimony that [petitioner] invested money in Hawkins' smuggling operation" (Pet. App. A22). He also contended that the government failed to disclose an alleged promise to Hawkins that Hawkins' wife would not be indicted (*ibid.*). Additionally, he alleged that FBI Agent Joseph Masterson gave perjurious testimony concerning the type of payment that was used to cover a deficit in a Cauble Enterprises bank account (*id.* at A26).

The district court held a two-day hearing on petitioner's motion and gave careful consideration to the briefs, the testimony, the relevant documents, and the full record of the prior trial (Pet. App. A22-A49; see also *id.* at A17-A18). The court rejected petitioner's claims that the Katko materials provided a basis for a new trial. It concluded that the Katko statements were not exculpatory, did not contradict the government's evidence and, if disclosed, would not have affected the outcome of the trial (Pet. App. A27-A29, A38-A39). The district court also "accept[ed] as credible" the government's denials that Hawkins had been promised favorable treatment to his wife in exchange for testimony, noting in addition that even if the allegations were true they

would not have changed the trial's outcome (*id.* at A39-A40). Accordingly, it denied a new trial on that ground. Finally, the court rejected petitioner's claim that alleged "perjury" at trial entitled him to a new trial (*id.* at A44). The court found that Agent Masterson did not testify falsely at petitioner's trial (*id.* at A35) and stated further that, even if it accepted petitioner's allegations, "the tools with which to destroy Masterson's testimony on this issue, as well as his general credibility, were in the hands of [petitioner] at trial * * * [and thus] they cannot be considered 'newly discovered' for purposes of sustaining a motion for [a] new trial, nor can they be considered as 'suppressed' for *Brady* purposes" (Pet. App. A44). The district court concluded (*id.* at A48):

> The evidence which convicted [petitioner] was overwhelming and simply could not be refuted. * * * Among the evidence were thousands of documents inexorably proving [petitioner]'s guilt; damning admissions from [petitioner]'s own mouth on cross-examination; testimony regarding Foster's mental condition and [petitioner]'s stream of improper loans to Foster which were used to finance the smuggling operation; proof that there were no cash cattle sales, contrary to what [petitioner] told the government in an effort to explain the huge amounts of cash he deposited in his account at Western State Bank during the years of the conspiracy. None of the newly discovered evidence in any way impugns the basic fact, admitted by [petitioner] at trial, that Cauble Enterprises' ranches, airplane, banks, Houston apartment and employees were used over and over again by the drug smugglers to further the conspiracy and that [petitioner] was in frequent personal contact with the smugglers. * * *

> This Court has carefully and painstakingly reviewed the evidence and simply put, the Government provided [petitioner] all of the discovery that he was entitled to. At all times the Government acted in good faith in its actions throughout the Cauble prosecution.

3. The court of appeals affirmed "without hesitation" the district court's ruling (Pet. App. A2). Looking first to Agent Masterson's alleged "perjury" at trial, the panel stated that "we certainly are not convinced that, taken in context, Masterson made an intentionally false statement; indeed, it is arguable whether the testimony was false or simply ambiguous" (*id.* at A5). The court concluded that, even if false, the challenged testimony "when considered in the context of his entire testimony, was not ultimately material to [petitioner's] conviction" (*ibid.*). Additionally, it pointed out that the materials proffered by petitioner to impeach the veracity of Masterson's testimony were petitioner's own records, subpoenaed from him in advance of trial, and available to petitioner at trial (*id.* at A6). The court accordingly declined to reverse on that ground.

The court also rejected petitioner's contentions concerning the Hawkins plea agreement and the Charles Katko materials. The court found that the record supported the trial court's conclusion that the government did not promise Hawkins favorable treatment to his wife as an element of the plea agreement (Pet. App. A8). It also agreed with the district court's factual finding that Katko made no exculpatory statement to the government (*id.* at A9-A10). "[C]onvinced that [petitioner] raises no issue here which entitles him to a new trial," it affirmed the district court's decision in all respects (*id.* at A11).

ARGUMENT

Petitioner contends that the court of appeals' decision conflicts with *United States* v. *Bagley,* No. 84-48 (July 2,

1985), and that the petition should be granted to correct the conflict (Pet. 13, 20). That contention is meritless. *Bagley* held that government nondislosure of evidence favorable to the defendant requires reversal of a conviction only if its suppression might have affected the outcome of the trial. Slip op. 10.[1] In the present case, both the district court and the court of appeals unequivocally rejected petitioner's allegations that the government withheld information or submitted perjured testimony. They further concluded that, even if petitioner's allegations were true, the purported actions had no effect on the outcome of the trial. Petitioner simply seeks further review of factual findings that were determined by the district court, affirmed by the court of appeals, and fully supported by the record. Consistent with this Court's settled practice of declining to reconsider factual determinations affirmed on appeal, the petition should be denied. *E.g., Branti* v. *Finkel,* 445 U.S. 507, 512 (1980).

1. a. Petitioner repeats (Pet. 10-11) his claim that FBI Agent Masterson lied at trial concerning the type of payment made to cure a deficit in a Cauble Enterprises checking account. Both courts below, however, expressly rejected petitioner's assertion that Masterson gave intentional false testimony (Pet. App. A5, A35). And indeed, the record amply demonstrates that his testimony was not false;

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[1]In *Bagley,* a prosecutor failed to disclose requested evidence that could have been used to impeach a government witness. The district court found, beyond a reasonable doubt, that the evidence would have had no effect on the outcome of the trial. Slip op. 5. The court of appeals disagreed, concluding that failure to disclose impeachment evidence required automatic reversal. *Id.* at 6, 8. This Court reversed, holding that "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.* at 10. A majority of the Court also agreed that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 14 (Justice Blackmun, with O'Connor, J., concurring); *id.* at 1 (Justice White, with the Chief Justice and Rehnquist, J., concurring).

rather, at most, it was simply capable of being misunderstood.[2] Petitioner's continued accusations of perjury, examined in light of the record and the decisions below, are frivolous.

Petitioner's accusations not only distort the record, they require petitioner to give Agent Masterson's "perjured" testimony an interpretation that is inconsistent with the government's theory of the case. The government pointed to the account deficit simply to demonstrate that—prior to the receipt of marijuana revenues—petitioner's business was encountering cash flow difficulties and needed to rely

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[2]Agent Masterson testified concerning petitioner's and Cauble Enterprises' bank records and, in particular, his examination of the relationship between cash deposits to their bank accounts and the arrivals of boatloads of marijuana (Tr. 598-601). He described a chart (GX 50), which the government offered into evidence, depicting the timing of cash deposits into the Cauble Enterprises "special account" and demonstrating that large unexplained cash deposits coincided with the arrivals of marijuana shipments (Tr. 618-619; see also *id.* at 2243-2244, 2271-2272, 2278-2279). Summarizing the chart, Masterson explained that in 1978 the bank account was enriched by cash deposits totalling $692,653.83 (Tr. 620), a figure that petitioner does not dispute. He also testified that in January 1978, the account had showed a large deficit that was "compensated for" by "[s]ubsequent cash deposits * * * [f]rom the sale of cattle, winnings in Las Vegas, and loan repayments" (Tr. 622).

Petitioner alleges that Masterson committed perjury on the ground that the first deposits to offset the January deficit came from a mid-January transfer of money from another Cauble account and from the sale of a certificate of deposit (Pet. 10). That fact was made clear during the government's cross-examination of petitioner at trial when, in questioning petitioner about the January deficit, the government pointed out that "a few days later there is a transfer. I believe there's a sale of a CD that paid to cover that [overdraft], and you transferred the employees' benefit account from [another business entity] to your operating account, to the tune of $50,000.00" (Tr. 2116-2117). Thus, Agent Masterson's testimony simply reflects some ambiguity—that the government later clarified—as to when cash deposits, attributable to marijuana shipments, were first made.

on extraordinary financial maneuvers to satisfy its obligations. The government then proved that, later that year, the business was infused with large, unexplained, cash deposits that coincided with the arrival of marijuana shipments.[3] Petitioner's interpretation of Masterson's testimony would suggest that the cash deposits coincided with the account deficit, rather than the subsequent arrival of marijuana shipments. That interpretation would detract from the government's proof that petitioner's business received revenues from marijuana smuggling.

In all events, assuming that Masterson's testimony on this point was ambiguous, petitioner could have clarified matters on cross-examination. Records establishing the nature of the mid-January deposits were in the possession of petitioner and his bank (Tr. 599-600, 619, 898, 2068). Petitioner admitted that he had seen them before the trial began (Tr. 2076-2077, 2080). Thus, there was no obstacle preventing petitioner from challenging Masterson's testimony at trial. In accordance with the adversarial responsibilities inherent in a criminal trial, see, *e.g.*, *Bagley*, slip op. 7, petitioner should have probed further if he truly believed that a relevant discrepancy existed.[4] Furthermore, any ambiguity left uncorrected would have redounded to petitioner's benefit. Indeed, petitioner used Masterson's testimony in a reply brief on direct appeal to argue that the government failed to prove a link between the marijuana importations and Cauble Enterprises' bank account (Pet. App. A35).

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[3]For example, the government showed that a 35,000 pound shipment of marijuana arrived in late January 1978, after the January deficit was remedied (Tr. 517; see *id.* at 2243), and that a significant cash deposit followed shortly thereafter on February 9, 1978 (Tr. 896).

[4]*Bagley* does not dispense with the traditional threshold requirement for a new trial based on newly discovered evidence—that the evidence, in fact, be newly discovered and not derive from the defendant's own files. See, *e.g.*, *United States* v. *Metz*, 652 F.2d 478, 479 (5th Cir. 1981).

In sum, petitioner's characterization of Masterson's testimony as "perjury" is wholly inaccurate and provides no ground for this Court's review.[5]

b. Petitioner's claim (Pet. 8-9) that the government withheld from petitioner an aspect of its plea agreement with Hawkins—namely, immunity from prosecution for his wife, Karen Jacobs—is also factually infirm. The district court determined that Hawkins was not promised immunity for his wife in exchange for his testimony (Pet. App. A29). The court of appeals affirmed that factual finding (*id.* at A8), which is fully supported by the record (see 7 R. 38-39, 41, 48, 80-81, 96, 103, 108) and plainly requires no further review. See, *e.g., Branti* v. *Finkel,* 445 U.S. 507, 512 n.6 (1980); *United States* v. *Ceccolini,* 435 U.S. 268, 273 (1978).

We note, in addition, that the government supplied petitioner with a copy of the Hawkins plea agreement and that petitioner used the agreement extensively at trial. Indeed, the plea agreement's terms—including the anticipated release of a government lien on Hawkins' ranch following his testimony (Tr. 280-281, 408-413, 468-469)—received specific attention in closing argument (*id.* at 2254). Given petitioner's extensive use of the plea agreement for impeachment purposes, it is inconceivable that any additional promise concerning Hawkins' wife would have altered the jury's evaluation of Hawkins' credibility. See Pet. App. A8, A29-A30.

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[5]Since both courts below specifically rejected petitioner's allegations of perjury (Pet. App. A5, A35) there is no reason to address petitioner's contentions (Pet. 17-18) concerning petitioner's "capacity to refute perjured testimony." Indeed, petitioner's continuing allegations of perjury are wholly unwarranted in light of petitioner's complete failure to demonstrate intentional use of known false testimony and the lower courts' unequivocal rejection of those claims. Compare, *e.g., Di Gilio* v. *United States,* cert. denied, No. 84-1866 (Oct. 7, 1985).

c. Petitioner is also factually wrong in contending that Charles Katko made an exculpatory statement to government investigators, concerning the testimony of Raymond Hawkins, that the government was required to disclose (Pet. 8-9). Hawkins testified at trial that Muscles Foster lent him $25,000 from funds that Foster had received from petitioner (Tr. 288). Petitioner agreed at trial that he gave Foster $25,000, knowing it was to be lent to Hawkins (Tr. 2101). Hawkins further testified that he gave $15,000 to Charles Katko to rent a truck (Tr. 288-289). Katko was not called by either side at trial. At the hearing on petitioner's motion for a new trial, Katko denied that he had received $15,000 from Hawkins, but admitted receiving $2000 or $2500 (Pet. App. A27). Katko also testified at the hearing that he informed a government investigator, prior to petitioner's trial, that he did not receive the $15,000. However, the investigators testified that Katko did not deny receiving $15,000 (7 R. 31, 35, 53, 121, 140) and their reports contained no evidence that Katko had made such a denial (Pet. App. A27-A28).

Based on this evidence, the district court found that there were no prior statements by Katko to government investigators that "refute[] or materially conflict[] with Hawkins' testimony that he paid Katko $15,000 for the lease of his trucks" (Pet. App. A28; see *id.* at A38-A39). The statements Katko did make to the government simply had no impeachment value and therefore did not require disclosure (*ibid.*). The court of appeals affirmed the district court's finding that "Katko made no exculpatory statement to the government" (*id.* at A9). The district court's factual findings, affirmed by the court of appeals and supported by the record do not—once again—merit further review. *Branti,* 445 U.S. at 512 n.6; *Ceccolini,* 435 U.S. at 273.

Moreover, as the district court stated, "[e]ven if the Government was in possession of evidence from Katko * * * that directly conflicted with Hawkins' testimony regarding the $15,000 payment to Katko, the evidence merely concerns a minor point of the overall charged drug smuggling operation and could in no way have affected the outcome of the trial" (Pet. App. A29). Thus, the court found that a new trial would be unwarranted under any standard of materiality (*id.* at A39).

2. Petitioner's assertion (Pet. 13) that this case "presents important questions left open by this Court's very recent decision in *United States* v. *Bagley*" is untenable. Petitioner simply presents factual allegations that were rejected by the trial and appellate courts. *Bagley* does not alter this Court's "settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred * * *." *Branti,* 445 U.S. at 512 n.6. Nor does it change the established rule that a district court's factual findings on a motion for a new trial must be affirmed unless "wholly unsupported by evidence." *United States* v. *Johnson,* 327 U.S. 106, 111 (1946).

As the district court stated (Pet. App. A20):

> [Petitioner] had a fair trial before this Court, he had a fair review of this trial before the Fifth Circuit Court of Appeals and the United States Supreme Court, he had a fair hearing before this Court on his Motion For New Trial. Society has given [petitioner] his due; an unfettered opportunity to exercise the constitutional and statutory rights guaranteed criminal defendants in this country—it is now time for [petitioner] to pay his debt to society.

The court of appeals agreed (Pet. App. A11). Further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1985

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No. 85-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

REX C. CAUBLE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Solicitor General's Brief in Opposition ("Br. in Opp.") urges this Court to deny certiorari in this important criminal prosecution principally on the ground that there are underlying factual issues that have been decided in the government's favor by the two courts below. Br. in Opp. 8. Our initial point, however, is that the court of appeals' decision is entitled to no weight whatsoever because its standard of review was plainly in error — that

rather than making the independent determination that this Court directed very recently in *United States v. Bagley*, 105 S.Ct. 3375 (1985), the Fifth Circuit abdicated its responsibility and affirmed the decision of the district court because it found no "abuse of discretion" and it could not conclude that the trial court's decision was "clearly erroneous." *See* Pet. 13-17.

This Court held in *Bagley* that the appellate court had the obligation to determine *independently* "whether there is a reasonable probability that" evidence not disclosed by the prosecution would have produced a different result in the trial. 105 S.Ct. at 3385 (plurality opinion).[1] The Solicitor General's Brief in Opposition demonstrates that the government, in its capacity of prosecutor, refuses to acquiesce in this square and deliberate holding. Instead, the Solicitor General cites *United States v. Johnson*, 327 U.S. 106, 111 (1946) — a decision that did not involve constitutional errors such as suppression or nondisclosure of evidence favorable to the defense — in support of the proposition that a district court's rejection of a motion for a new trial on grounds of suppressed evidence must be affirmed by an appellate court "unless 'wholly unsupported by evidence.' " Br. in Opp. 13.

It appears, therefore, that if certiorari is denied in this case, federal prosecutors will apply the erroneous proposition of law now put forward by the Solicitor General — that appellate courts must routinely affirm denials of motions for a new trial where favorable evidence has been withheld so long as there is *any* evidence to support the conclusion of the district court. If this Court wants to

1. Justice Blackmun's opinion in *Bagley* noted in a footnote that in *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court was not bound by the state court's decision concerning the likelihood that certain suppressed evidence would have affected the verdict. "The Court conducted its own independent examination of the record . . . . " 105 S.Ct. at 3382, n.8 (1985). On the basis of this "independent examination," it reversed the judgment of conviction.

avoid years of misapplication of *Bagley* by federal prosecutors and dozens of cases in which unjust results may be sustained because of such misapplications, it should grant the writ of certiorari and, at the very least, direct the court of appeals now to review the district court's conclusion by the correct *Bagley* standard.[2]

We turn now to a detailed response to the Solicitor General's particular answers to our claim that relevant and persuasive evidence was knowingly withheld from the defense. In each of three instances, the Solicitor General's Brief in Opposition has either misstated our contention or erroneously described the relevant portion of the record.

1. The FBI Agent's False Or Misleading Testimony.

Contrary to the Solicitor General's assertion, the court of appeals did *not* rule that Agent Masterson's testimony was truthful. The court of appeals carefully refrained from making *any* factual finding on the truth or falsity of Masterson's testimony. It stated only that it was "certainly not convinced that, taken in context, Masterson made an intentionally false statement; indeed, it is arguable whether the testimony was false or

2. The precedents cited by the Solicitor General in support of his argument that the "two-court rule" applies to this case are all inapposite. In *United States v. Ceccoloni*, 435 U.S. 268 (1978), this Court declined to "disturb" the conclusion of two lower courts that challenged evidence would not inevitably have been discovered partly because "the Government has not sought review" of that determination. 435 U.S. at 273. This Court did, however, review and reverse the other finding of the court of appeals that there was insufficient "attenuation" between an illegal search and challenged testimony to permit the testimony's use at trial. 435 U.S. at 273-279. The "attenuation" question is comparable to the "reasonable-probability-of-a-different-result" question that is at issue here. And in *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980), the petitioner did *not* contend that the court of appeals had applied an erroneous standard of review. He simply sought to reverse evidentiary conclusions that had been fully reviewed.

simply ambiguous." Pet. App. A-5. The court of appeals rested its holding on two alternative grounds: the alleged non-materiality of Masterson's testimony and the defendant's alleged lack of due diligence.

The court of appeals could not, in fact, make any finding on the truth of Masterson's testimony because during the evidentiary hearing on petitioner's new trial motion, the district judge prohibited the taking of any testimony on this issue. *See* Pet. 10-11.[3] The court of appeals knew that there was no basis in the record for the district court's unexplained "finding" that "Masterson did not testify falsely as to the January 1978 Western State Bank special account overdrafts." Pet. App. A-35.

The Solicitor General's Brief in Opposition is self-contradictory in its discussion of the Masterson testimony. The Court is first advised that "the record amply demonstrates that his testimony was not false; rather, at most, it was simply capable of being misunderstood." Br. in Opp. 8-9. In a lengthy footnote, the Solicitor General characterizes petitioner's claim as based "on the ground that the *first* deposits to offset the January deficit came from a mid-January transfer of money from another Cauble account and from the sale of a certificate." Br. in Opp. 9, n.2 (emphasis added). But the record is clear that the "January deficit" was *completely* liquidated by checks and a bank transfer. The Solicitor General's own quotation of Masterson's testimony demonstrates that Masterson testified falsely that the deposit was "compensated for by [s]ubsequent cash deposits . . . [f]rom the sale of cattle, winnings in Las Vegas, and loan repayments (Tr. 622)." *See* Br. in Opp. 9, n.2. This testimony

3. The Solicitor General simply ignores this point in his brief. He takes petitioner to task for "petitioner's complete failure to demonstrate *intentional* use of *known* false testimony . . . ." Br. in Opp. 11, n.5 (emphasis added). By foreclosing all testimony on this issue, however, the district court prevented petitioner's counsel from making any record on Masterson's testimony or on the prosecutor's motives.

is not simply "ambiguous" or "capable of being misunderstood." Stripped of euphemisms, it is blatantly false.[4]

On the question of "due diligence," the Solicitor General declines to respond to our argument (Br. in Opp. 11, n. 5), and simply ignores our discussion of the conflicting case law from three circuits. Pet. 17-18. The Solicitor General cites only one reported "due diligence" decision that purportedly supports his position — another ruling by the Fifth Circuit. *United States v. Metz*, 652 F.2d 478, 479 (5th Cir. 1981). But *Metz* did not involve any *Napue* or *Brady* claim, and it therefore provides no support for the government's position.

The Solicitor General also takes petitioner to task for giving Masterson's testimony an "interpretation that is inconsistent with the government's theory of the case." Br. in Opp. 9. But rather than "interpret" the prosecutor's position, we quoted, at length, pertinent portions of the prosecutor's opening and closing statements to the jury. Pet. 6-7. It was clear from these passages that the prosecutor sought to convince the jury that all *three* events — the bank account deficit, the arrival of a boat-load of drugs, and the influx of cash into Cauble Enterprises — coincided. This was dramatic proof of motive, confirmed to the jury when it reheard Masterson's testimony just prior to the verdict. Pet. 7-8. The Solicitor General's attempt now to rework the record

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4. The Court is also advised that the prosecutor "later clarified" this "ambiguity" in his questioning of petitioner. Neither court below relied on this argument, and it is contradicted by the record. During petitioner's cross-examination, the prosecutor suggested that the overdraft was compensated for by "sale of a CD that paid to cover that" and a transfer of $50,000 from "the employees' benefit account from [one of the western wear stores]." Tr. 2116-17. Petitioner denied the second assertion, and was not asked again about the alleged CD. The jury could not have understood this exchange as a correction of Masterson's false testimony, which was read to the jury shortly before its verdict. Pet. 5-7.

to diminish the materiality of this testimony merely demonstrates the importance of the direction to lower courts in *Bagley* to apply the materiality standard with sensitivity to the problems of "reconstructing" after the trial what might have happened during trial if there had been no constitutional violation. 105 S.Ct. at 3384.

2. The Prosecutor's Procedural Concession To The Former Wife of His Principal Witness.

Our Petition stated that "the defense was not told that Hawkins had bargained for immunity for his ex-wife and had been given an assurance that she would be given an opportunity to cooperate before she was prosecuted." Pet. 8-9.[5] The district court found (Pet. App. A-29):

> Government prosecutor David Baugh promised Hawkins that he would go to Jacobs [Hawkins' ex-wife] first and give her an opportunity to cooperate before the Government indicted her or had her arrested.

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5. The prosecutor testtified at the new trial hearing that Hawkins bargained for an agreement that his wife would not be prosecuted as part of the deal for his cooperation. He also testified that this was not agreed to, but, as initially related by the prosecutor, "the agreement included the promise that we would go to his wife first, and give her the opportunity to cooperate before we indicted her or had her arrested. If she didn't take advantage of that opportunity, we were going to make every effort to have her picked up." N.T. Tr. 102.

Later on, the prosecutor testified that he didn't think "it was really part of the deal" with Hawkins. But he did give Hawkins this "assurance" respecting Ms. Jacobs. N.T. Tr. 103.

As the court of appeals implicitly acknowledges in its opinion, the important point on the *Brady* disclosure issue is whether Hawkins had a "subjective belief" that the "assurances" he was given regarding his wife were part of his agreement with the government. See Pet. App. A-8, *citing United States v. Onori*, 535 F.2d 938, 945 (5th Cir. 1978).

The Solicitor General blatantly misstates the claim in our Petition as concerning "immunity from prosecution for [the witness'] wife, Karen Jacobs." (Br. in Opp. 11). On this basis, the Solicitor General invokes the "two court" rule and urges that certiorari be denied because no such immunity was promised.

We did not argue here that the prosecutor promised immunity for Jacobs. We argued only that he did not disclose that he had promised to give her an opportunity to cooperate before indicting her — a proposition which was not contested and which the district court explicitly found. The reason that this was rejected as a basis for a new trial by the court of appeals was "that the disclosure of this information would not have produced a different result at trial," since "the jury was informed that Hawkins was testifying pursuant to his plea-bargain agreement with the Government, and receiving favorable treatment in exchange for his testimony . . ." Pet. App. A-8-A-9.

This Court has recognized the importance of full disclosure to defendants of all terms of plea arrangements with government witnesses. *See Giglio v. United States*, 405 U.S. 150 (1972). Due Process requires disclosure of the whole agreement. *See, e.g., United States v. Bigeleisen*, 625 F.2d 203, 208 (8th Cir. 1970). And the right of the defense counsel to cross-examine the witness "is not curtailed by the absence of explicit government promises of leniency, for the defense may attempt to show government conduct which might have led a witness to believe that his prospects for lenient treatment by the government depended on the degree of cooperation." *See United States v. Iverson*, 637 F.2d 799, 804 n.16 (D.C. Cir. 1981), *quoting United States v. Leonard*, 494 F.2d 955, 963 (D.C. Cir. 1974); *United States v. McCrane*, 547 F.2d 204, 206 (3d Cir. 1976).

Hawkins bargained for a bald promise for a relative who took the Fifth Amendment in a grand jury, and who,

he knew, was certainly at risk. He received a lesser procedural "assurance" for her which was adequate to protect her in any event, so long as *his* testimony was sufficiently strong to convict petitioner, thereby eliminating any government need for her cooperation. The very tentativeness of the arrangement with respect to Karen Jacobs strengthened the prosecutor's hold over Hawkins. As observed in *Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976):

> [R]ather than weakening the significance for credibility purposes of an agreement of favorable treatment, tentativeness may increase its relevancy. This is because a promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced — the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor.

The prosecutor's "assurance" to Hawkins respecting the witness' former wife gave him effective emotional control over the witness. Petitioner had a constitutional right to confront Hawkins with that fact in the jury's presence. *See Davis v. Alaska*, 415 U.S. 308, 318 (1974). But the fact was never disclosed to petitioner's counsel. *See* Pet. 9.

3. Exculpatory Statements Contradicting A Trial Witness' Incriminating Testimony.

The Solicitor General asserts that our Petition is "factually wrong" in describing a statement, not disclosed before or during trial, made to the FBI by Charles Katko contradicting Hawkins' trial testimony. Br. in Opp. 12. There is no factual dispute, however, regarding the contents of Katko's undisclosed statement, which is in the record as Defendant's New Trial Exhibit No. 3. Katko told government agents that Hawkins had leased a truck

for $2,000 for the purpose of hauling hay. This conflicted with Hawkins' trial testimony that he paid Katko $15,000 to lease trucks to be used in the conspiracy.

Two issues are presented on this matter by our Petition: (1) What is the standard for disclosure under *Brady* of statements which are useful for impeachment? (2) What is the validity, after *Bagley*, of a "clearly erroneous" or "abuse of discretion" standard of appellate review?

The thrust of the dispositions below was to avoid all issues raised here relating to Mr. Hawkins by insisting that Hawkins was, in any event, "thoroughly impeached." *E.g.*, District Court opinion, Pet. App. A-30-A-31; *id.* A-28. But Hawkins was the key witness offering direct testimony against petitioner, in an otherwise circumstantial case. After *Bagley* the lower court should be directed to reassess, by a standard less deferential than "abuse of discretion" or "clearly erroneous," whether the withholding of impeachment evidence could be immaterial on the theory that the government's major witness was already "thoroughly impeached."

The constitutional rights implemented by decisions such as *Brady* and *Napue* can be eviscerated if prosecutors are permitted to trivialize their violations of these rights by invoking appellate review standards framed in terms of "abuse of discretion" and "clearly erroneous." The *Bagley* decision demonstrates this Court's resolve to implement the prosecutor's obligation to disclose exculpatory evidence by demanding that such claims be scrutinized by a discerning judicial eye. The decision below — issued before *Bagley* was decided — should be reversed in light of *Bagley*.

CONCLUSION

For the foregoing reasons and those stated in our Petition, certiorari should be granted. The judgment below may be vacated and the case remanded for reconsideration in light of *United States v. Bagley,* 105 S.Ct. 3375 (1985).

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